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Article

International Responsibility for Human Rights Violations by American Indian Tribes

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The American Indian tribes have a unique status in the law of the United States. They are characterized as sovereigns that predate the formation of the republic and possess inherent powers and immunities. Their powers permit them to create and enforce laws and generally to operate as autonomous governmental entities with executive, legislative, and judicial branches. Tribes enjoy immunity from suit and exemption from federal and state constitutional provisions which protect individual rights. These powers and immunities provide a connection between tribal governments and U.S. international human rights obligations. This Article explores that connection. It examines whether the tribes may breach certain international human rights obligations of the United States, whether tribal violations may incur U.S. international responsibility, and if so, what consequences might result. It constructs an argument that the United States has failed to implement fully its international human rights obligations and that it can be held internationally responsible for tribal violations of human rights. This argument leads to policy recommendations for the United States and tribal governments.

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INTRODUCTION

Recent work on international human rights and indigenous peoples focuses on the promotion and protection of "self-determination" and on the development of group rights.[1] This work builds upon the significant progress indigenous peoples have made toward the development of collective rights under international law.[2] International human rights tribunals have decided cases dealing with the rights of indigenous peoples,[3] while individual members of indigenous groups have successfully challenged State[4] violations of international human rights.[5]

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1. *See, e.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed., 2004) (detailing the emerging role of indigenous peoples in international law); Harriet Ketley, *Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples*, 8 INT'L J. MINORITY & GROUP RTS. 331 (2001) (identifying fora available to indigenous peoples to assert rights against the State); Fergus MacKay, *The Rights of Indigenous Peoples in International Law, in* HUMAN RIGHTS AND THE ENVIRONMENT: CONFLICTING NORMS IN A GLOBALIZING WORLD (Lubya Żarsky ed., 2003) (examining the connections between collective rights of indigenous peoples, the environment, and international law).

2. This progress has come largely through the work of indigenous peoples coming together under the auspices of the United Nations Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues. Through the Working Group, the Draft Declaration on the Rights of Indigenous Peoples, U.N. Comm. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, Working Group on Indigenous Populations, Report of the Working Group on Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1993/2/29 (Aug. 23, 1993), was developed and the Sub-Commission on Prevention of Discrimination and Protection of Minorities has approved it. U.N. Comm. on Human Rights, Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, *Discrimination Against Indigenous Peoples: Technical Review of the United Nations Draft Declaration of the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994). The International Labor Organization Convention (No. 169) Concerning the Protection of Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991), provides for the protection of indigenous individuals and "peoples." *Id.* at art. 1.3 (requiring that "peoples" shall not be interpreted as having any implications which may attach to the term under international law). The work of indigenous peoples in the international plane has been directed at preventing violations of indigenous individual or collective rights by States. *See generally* ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 148-68 (2001). The governmental nature of the American Indian tribes provides an opportunity to examine potential international consequences of individual rights violations by an indigenous group operating as a sub-State government.

3. Although declared inadmissible for failure to exhaust domestic remedies, the Cherokee Nation case brought before the Inter-American Commission on Human Rights (IACHR) provides a good example of the types of cases indigenous groups might pursue against States in the international arena. Cherokee Nation v. United States, Case 11.071, Inter-Am. C.H.R., Report No. 6/97, OEA/Ser. L/V/II.a5, doc. 7 (1997).

4. This Article distinguishes the traditional subjects of public international law, "States," from the federated political entities of the United States, "states," by capitalizing the former but not the latter.

5. *See, e.g.*, Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02/OEA/Ser. L/V/II 717, doc. 1 rev. 1 ¶¶ 96-98 (2001) (finding the United States internationally responsible for violations of the property rights of the members of the Western Shoshone tribe); Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166 (1981) (declaring Canada responsible for continuing violation of

The study of indigenous peoples and international law has thus been mostly limited to the development and conceptualization of indigenous groups' (or indigenous individuals') rights against the State.[6] This narrow approach to the overlap between international human rights law, municipal law, and indigenous rights neglects potential consequences of individual human rights violations by indigenous groups.

The indigenous peoples of the United States, the American Indian tribes, have legislative authority, executive departments, police, and prisons. They resemble sub-State units of government, and exercise extensive governmental authority. This governmental status raises several questions about the potential for tribal entities to violate individual human rights as protected by international law binding on the United States. Can the tribes exercise their governmental powers in a manner which violates an asserted human right? Has the United States implemented human rights protections against the tribes? Can tribal conduct constitute a breach of international human rights obligations binding on the United States and, if so, what are the consequences? And perhaps most importantly, is tribal conduct attributable to the United States under international law?

This Article explores these questions, with a principle focus on whether the United States itself could incur international responsibility for human rights violations committed by American Indian tribes. The scope of the Article is thus modest. It does not attempt to engage with normative problems as to whether indigenous peoples or other sub-State entities *should* be bound by international human rights norms. In fact, because human rights are so often individual rights, tribes and other sub-State entities do not need to be bound by international norms for accountability still to attach. Only one entity, the State, as a subject of international law, may be internationally responsible for violations of those individual rights.[7] Under the international law of State responsibility, sub-State

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individual rights of aboriginal women and their children); Kitok v. Sweden, Communication No. 197/1985, U.N. Human Rights Comm'n, U.N. Doc. CCPR/C/33/D/197/85 (finding no internationally wrongful act in the denial of an individual's asserted right to herd reindeer).

6. *See, e.g.*, Curtis G. Berkley, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992) (maintaining that tribes should use international law in securing a right of self-determination against federal abrogation); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, *in* THE RIGHTS OF MINORITY CULTURES 179 (Will Kymlicka ed., 1995) (asserting inadequacies of a liberal conception of individual rights in the protection of indigenous peoples); Ketley, *supra* note 1 (exploring the procedural difficulties facing indigenous groups as non-State entities in asserting claims in international tribunals); Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, *in* PEOPLES' RIGHTS 64 (Phillip Alston ed., 2001) (refining theory for potential indigenous assertion of collective rights in international law); Benedict Kingsbury, *Claims by non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992) (developing theory for discourse of groups in international law in claims for self-determination, minority rights, historical sovereignty, and indigenous rights).

7. *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of its Fifty-Third Session (Apr. 23 -

entities cannot themselves be responsible for violations of a State's international human rights obligations.[8] The obligations which bind the United States extend to every person within U.S. territory or control, regardless of whether such individuals are tribal members, non-tribal members, or foreign nationals.[9] If an individual right is violated and the violation is attributable to the United States, then the United States bears international responsibility for it. These are the presumptions underpinning this work: that the United States is bound by certain conventional and customary international human rights norms and that all individuals within U.S. territory or control hold such basic rights. Although this Article uses language such as "tribal violations of human rights," strictly speaking these statements refer to a tribal act or omission which breaches an individual right that is protected by international law and that binds the United States. A tribe may violate an individual's internationally protected right because the individual is a bearer of such right, *not* because the international human right law at issue binds the tribe.

The Article is structured as follows. Part I outlines the status of American Indian tribes in U.S. federal law. It explores their status as sovereigns, defines their governmental powers, and identifies the municipal law doctrine of sovereign immunity. This doctrine becomes particularly relevant in later sections which explore the gaps in U.S. implementation of its international human rights obligations. Part II lays out the relevant human rights obligations binding on the United States and then attempts to show that there are substantive and procedural gaps in the implementation of these obligations. However, these gaps are identified in U.S. reservations and declarations to the international community. Because these obligations are neither exempted from coverage under international instruments nor currently enforced under U.S. federal law, the United States may have left itself vulnerable to international enforcement for alleged violations. The last part of Part II examines the possibility of tribal actions violating an individual's international human rights and identifies certain human rights provisions that are particularly susceptible to tribal violation. Part III discusses the potential remedies available for violations of individual rights under municipal law, including both tribal and federal remedies. It demonstrates that most remedies can only be obtained in a tribal forum and addresses the implications of this

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June 1 & July 2 - Aug. 10, 2001), U.N. GAOR, 56th Sess. Supp. No. 10, at 63-80, U.N. Doc. A/56/10 (2001) [hereinafter *Articles*].

8. *See* Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 161 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

9. *See, e.g.*, Theodor Schilling, IS THE UNITED STATES BOUND BY THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS IN RELATION TO THE OCCUPIED TERRITORIES? (N.Y.U. School of Law, Global Law Working Paper 08/04, 2004) (exploring the limits of extraterritorial application of United States international human rights obligations).

reality. Part IV completes this examination of accountability, by arguing that international law permits actions of the tribes or of tribal officials to be attributed to the United States and identifying several tribunals with authority to hear a human rights claim against the United States. Finally, Part V concludes by suggesting implementation policies that the United States may choose to adopt to avoid being held internationally responsible for a human rights violation by tribes or tribal officials. As a counter-balance, Part V also identifies means available to tribes to forestall unwanted federal action that might infringe upon their political independence and sovereignty.

I. STATUS OF AMERICAN INDIAN TRIBES IN MUNICIPAL LAW

A. Tribes as Political Communities

American Indian tribes, as acknowledged in the U.S. Constitution,[10] are distinct, self-governing political communities with their own legal systems separate from federal or state governments.[11] The several hundred tribal governments operating in the continental United States vary in size and complexity and assert authority over a broad diversity of polities and territories.[12] Certain California *rancherias*, for instance, comprise only a few families and acres of land,[13] whereas the Navajo Nation, one of the largest tribes, operates as a complex political community whose population approximates Iceland's and whose territorial extent rivals that of the Republic of Ireland.[14]

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10. U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to regulate commerce with foreign Nations, among the states, and with the Indian tribes); U.S. CONST. art. I, § 2, cl. 3 (excluding Indians who are taxed from definition of free persons for purposes of apportionment). Other constitutional provisions which do not mention the tribes explicitly have recognized further delegated powers of the federal government over Indian tribes. U.S. CONST. art. II, § 2, cl. 2 (treaty power); U.S. CONST. art. I , §8, cl. 11 (war power); U.S. CONST. art. IV, § 3, cl. 2 (power over federal property).

11. *See* United States v. Wheeler, 435 U.S. 313, 323-24 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

12. This Article uses "tribal government" to refer to the legislative, executive, administrative, and judicial bodies established under the particular tribal constitution.

13. For instance, the Buena Vista Rancheria of Me-Wuk Indians, a federally recognized tribe with twelve members, occupies a reservation of approximately 67 acres. *See* TILLER'S GUIDE TO INDIAN COUNTRY 383 (Veronica E. Velarde Tiller ed., 2005); National Indian Gaming Commission, *Buena Vista Rancheria of Me-Wuk Indians Land Determination* (June 30, 2005) *available at* www.nigc.gov/nigc/documents/land/buenavista_pg1.jsp (last visited Nov. 19, 2005).

14. The Navajo Nation comprises approximately 68,909 square kilometers of land while the Irish Republic comprises 68,890 square kilometers. The Navajo Nation's population is approximately 180,462, while Iceland's 2005 population was estimated to be 296,737. TILLER'S GUIDE TO INDIAN COUNTRY, *supra* note 13, at 328; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2005, *available at* http://www.cia.gov/cia/publications/factbook/geos/ic.html.

Citizens of tribes are typically referred to as "members," and most tribes have exclusive authority to define their membership or enrollment.[15] Membership in a tribal polity is a political, not a racial or ethnic, classification.[16] Although the tribes comprise mainly indigenous individuals descended from pre-Columbian inhabitants of North America, tribes are not necessarily ethnically homogenous. They have been voluntarily and forcibly integrated with others,[17] and several tribes historically naturalized non-indigenous peoples, such as escaped or freed African slaves.[18] In addition to tribal membership, American Indians born in U.S. territory hold both national and state citizenship.[19] Certain tribes whose territory has been severed by the U.S.-Mexican or U.S.-Canadian national borders may enroll members from the non-U.S. side of the boundary, making it possible for some tribal members to be foreign nationals but not others.

B. Tribal Sovereignty

U.S. municipal law conceptualizes tribal governments as one of three "sovereign" institutions, in addition to federal and state governments. This system regards American Indian tribes as pre-existing entities outside the federal framework.[20] Yet even the structural interaction of tribes with the United States government has not been simple. In several respects, United States law categorizes tribes as entities analogous to foreign States rather than regional sub-State entities.[21] Notably, until 1871 the federal

15. Unless limited by treaty or statute, each tribe as a body politic has the power to determine its own membership. *See* Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218, 222-23 (1897).

16. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (stating that Indian preference "is political rather than racial in nature").

17. *See* Cherokee Intermarriage Cases, 203 U.S. 76; Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) (holding that intertribal agreement established citizenship rights and requirements).

18. *See generally* WILLIAM KATZ, BLACK INDIANS: A HIDDEN HERITAGE (1986); KENNETH PORTER, THE BLACK SEMINOLES (1996). *See also* Allen v. Cherokee Nation Tribal Council, No. JAT-04-09 (Cherokee March 7, 2006) (holding that statutory blood quantum requirement for membership in the Nation violates Cherokee Nation constitutional provision extending membership to freedmen) .

19. 8 U.S.C § 1401(b) (2000) (naturalizing Indians born in U.S. territory); U.S. CONST. amend. XIV, § 1.

20. Talton v. Mayes, 163 U.S. 376, 382-84 (1896) (dismissing habeas corpus proceeding against Cherokee Nation high sheriff and holding that Cherokee Nation powers of government do not flow from the federal constitutional arrangement); United States v. Wheeler, 435 U.S. 313 (1978) (stating that tribes possess inherent powers of sovereignty not withdrawn by treaty, act of Congress or by implication, so violation of tribal law by member constitutes a violation against a sovereign separate from the federal or state governments).

21. The historical justifications for treatment of the American Indian tribes as sovereigns emerge from the European doctrine of discovery. This doctrine gave the discovering European country title to the lands of non-Christian peoples against all other European powers. This right was subject to an Indian right of occupancy which only the discovering

government dealt with the tribes through treaties which U.S. courts continue to classify as equivalent to international treaties in municipal law.[22]

Each tribe's governmental powers vary depending on its unique treaty history and applicable acts of Congress. To encompass this diversity, and to evaluate effectively the tribal-international human rights law nexus, this Article uses a broad concept of tribal authority.[23] Within this broad category, two general types of American Indian tribes must be distinguished: those recognized by the federal government and those without such recognition. Federal recognition weaves tribes into the fabric of U.S. constitutional law by accommodating certain tribal powers and immunities within municipal law.[24] Unrecognized tribes may possess rights normally held by political communities (such as treaty-based hunting or fishing rights) against the United States, but municipal law largely regards tribes without federal recognition as private collective associations rather than as governments with legislative or enforcement jurisdiction.[25]

In the U.S. Supreme Court's foundational Indian-law trilogy of cases,[26]

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power could acquire through purchase or conquest. The British right to acquire lands in North America passed to the United States after the American Revolution. *See* Johnson v. M'Intosh, 21 U.S. 543, 571-75 (1823). A distinctly American version of the public international law doctrine, *occupatio bellica*, has been identified as the root of federal power over tribes. This doctrine refers to a persisting conquered people, such as the French after 1940. Robert Cooter & Wofgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I of II)*, 46 AM. J. COMP. L. 287, 295-309 (1998) (characterizing the position of the tribes as analogous to *occupatio bellica* and developing three phases for the historical deprivation of tribal sovereignty: (1) independence and autonomy; (2) conquest and submission; (3) modern tribal government with dependent sovereignty). It has also been argued that no legal basis exists for the legitimate assertion of U.S. municipal law over the tribes. *See, e.g.*, Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595 (2004). Laying these historical problems to one side, a summary of United States municipal law vis-à-vis the tribes provides a foundation for examining implementation of international obligations against these unique sub-State governmental entities.

22. *See, e.g.*, Cheung v. United States, 213 F.3d 82, 89-90 (2d Cir. 2000) (explaining that Indian treaties are equivalent in status to treaties with foreign nations).

23. Alaskan and Hawaiian Natives fall outside this description as do tribes whose adjudicative jurisdiction has been compromised by Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588-90 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 and other scattered sections in 18 and 28 U.S.C.), which extends state jurisdiction to many tribal matters.

24. One should not confuse this municipal law doctrine of recognition with the general international principle, though the historical status of the tribes as entities capable of treating on the international plane may inform the early development of the municipal recognition doctrine. On the international doctrine of recognition, see STEFAN TALMON, RECOGNITION IN INTERNATIONAL LAW (2003).

25. Padraic McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 431 (2002).

26. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (explaining that the doctrine of discovery gives the "discovering" European State the sole right to acquire tribal territory through "purchase or conquest"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (stating

Chief Justice Marshall articulated a view of tribes as distinct independent political communities with exclusive authority in their territories derived from their original tribal sovereignty. Nonetheless, the Court found that the tribes' comparative weakness and dependence upon the United States required divestiture of external sovereignty: specifically, the tribes' rights to establish relations with foreign States[27] and to cede lands to any entity other than the federal government.[28] Though the Court disagreed with tribal claims to full independence, the tribes retained internal aspects of sovereignty to govern themselves and others within their territory.[29] Municipal law today continues to characterize the tribes' powers as derivative of their sovereign status predating formation of the republic. Their legislative and enforcement jurisdiction is inherent; it does not depend upon federal delegation, though the federal government may delegate additional authority to the tribes.[30]

Following this deprivation of external sovereignty, Congress and the courts have steadily eroded tribal powers.[31] The federal common law doctrine of congressional plenary power over tribes[32] permits Congress to eliminate or reduce tribal powers. The doctrine extends to the point of termination of the U.S.-tribal relationship[33] (changing a tribe's status from recognized to unrecognized), although certain tribal powers or immunities may survive this termination.[34] One might infer that this congressional power over tribal governments makes tribal sovereignty an illusory doctrine in terms of U.S. municipal law.[35] While this may be the case, tribal governments do exercise significant governmental powers, and the official

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that treaties demonstrate tribe is a "state," a distinct political society separated from others capable of managing its own affairs and governing itself, but not a foreign state); Worcester v. Georgia, 31 U.S. 515 n.2 (1832) (deeming the United States a tribal "protector" in an unequal alliance, yet noting the tribes retain all internal attributes of sovereignty).

27. *Worcester*, 31 U.S. at 559.

28. *M'Intosh*, 21 U.S. at 574.

29. *Worcester*, 31 U.S. at 559-563.

30. United States v. Lara, 541 U.S. 193 (2004) (holding that congressional authority over Indian affairs includes power to delegate federal authority to the tribes, but congressional act in restoring tribal inherent authority to exercise criminal jurisdiction over non-members was not a delegation of federal power).

31. *See, e.g.*, Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2 UTAH L. REV. 443, 483-517 (2005).

32. Talton v. Mayes, 163 U.S. 376, 384 (1896).

33. Menominee Tribe v. United States, 388 F.2d 998, 1000-01 (Ct. Cl. 1967) (Court of Claims exercising jurisdiction over tribe's claim even though tribe had been terminated by an act of Congress). Congress has abandoned the termination policy, but still has the authority to terminate a tribe if it should choose to do so. *See* Santa Rosa Band v. Kings County, 532 F.2d 655, 662-63 (9th Cir. 1975).

34. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) (survival of terminated tribe's treaty hunting and fishing rights).

35. On the other hand, powerful theoretical arguments against a legitimate source of the plenary power have been made. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHICAGO L. REV. 671, 687-701 (1989).

federal government policy of self-determination has aided development of these governmental powers.[36] Federal courts also assert authority to divest tribal powers pursuant to a common-law doctrine that the tribes occupy a dependent position in the hierarchy of American sovereigns: federal courts may thus refuse to recognize tribal powers seen as inconsistent with their status as dependents of the federal government.[37]

C. Tribal Sovereign Immunity

The vital component of federal Indian law for purposes of this study is the doctrine of tribal sovereign immunity. Because federal common law conceptualizes tribes as a sort of sovereign, its sovereign immunity doctrine extends to them.[38] As the Supreme Court said in *Santa Clara Pueblo v. Martinez,* "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[39] This immunity shields the tribe, tribal agencies, and tribal officials acting in an official capacity against lawsuits challenging public acts *(jure imperii)* or commercial acts *(jure gestionis)* in federal, state, or tribal courts. It is the same doctrine that shields foreign States, the federal government, and state governments from suit. In practice, however, tribal immunity can be more extensive than that accorded to other governments, because statutory and judicial limitations restricting immunity do not generally apply to the tribes.[40] For instance, although the federal and state governments statutorily waive immunity against tort claims, enabling individuals injured by governmental officials to seek compensation, many tribes have not done so.[41] This immunity will be explored in greater detail

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36. J. Kalt & J. Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule,* Joint Occasional Papers on Native Affairs No. 2004-03 (The Harvard Project on American Indian Economic Development, 2004) .

37. *See* Montana v. United States, 450 U.S. 544, 564 (1981) (holding that the exercise of tribal authority over non-Indian hunting and fishing on fee lands beyond what is necessary to protect self-government or to control internal relations is inconsistent with dependent status of the tribes); Rice v. Rehner, 463 U.S. 713, 726 (1983) (holding that dependent status means state may require liquor licenses for sale of liquor for off-premises consumption in tribal authority).

38. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (holding that tribes and tribal officers are immune from actions brought by state for collection of state taxes).

39. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

40. For a good description of sovereign immunity as it applies to federal and state governments and the limitations placed on these governments which in certain cases do not apply to tribes, see John Duffy, *Sovereign Immunity, the Officer Suit, and Entitlement Benefits,* 56 U. CHICAGO L. REV. 295 (1989).

41. *See, e.g.,* Kiowa Tribe of Oklahoma v. Manufacturing Tech., 523 U.S. 751 (1998) (exercising judicial deference to Congress and declining to abrogate tribal sovereign immunity in a juridical setting); Sac and Fox Nation v. Hanson, 47 F.3d 1061, 1064-65 (10th Cir. 1995) (extraterritorial commercial activity does not strip tribe of its sovereign immunity); U.S. Commission on Civil Rights, *The Indian Civil Rights Act: A Report of the U.S. Commission on Civil*

in the sections that follow.[42]

D. Tribal Governmental Powers

Tribes retain legislative and enforcement jurisdiction over their internal affairs. This jurisdiction includes the power to define their polity,[43] to create their own form of government,[44] to exclude individuals from their lands,[45] to make and enforce criminal and civil laws,[46] to levy taxes,[47] to regulate domestic relations,[48] and to decide whether to develop natural resources within their territories.[49] Tribal law enforcement officers have authority to stop and investigate non-Indians on tribal lands for violations of state or federal law and may detain and transport alleged offenders to the authorities with adjudicative jurisdiction.[50] More fundamentally, the tribes organize their own governmental and political institutions.[51] Most model their governments on the United States and create formal branches with partial separation of powers.[52] Others have retained traditional forms of government and customary legal systems. Certain pueblos in the southwest United States, for example, retain traditional governments based on unwritten customary law, without a formal court structure,[53] while the

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Rights June 1991 63-67 (1991) [hereinafter *Commission Report*].

42. For a comprehensive analysis of the tribal sovereign immunity doctrine, see Andrea Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661 (2002).

43. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (holding that a tribe's right to define its own membership is "central to its existence").

44. *Id.* at 62-63.

45. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

46. *See* United States v. Wheeler, 435 U.S. 313 (1978).

47. *See, e.g.*, Merrion, 455 U.S. at 159 (holding that tribes retain inherent power of taxation as essential aspect of sovereignty); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) (requiring no federal authorization of tribal taxes).

48. *See* Fisher v. District Court, 424 U.S. 382 (1976).

49. *See, e.g.*, United States v. Shoshone Tribe, 304 U.S. 111 (1938); Cherokee Nation v. Journeycake, 155 U.S. 196 (1894).

50. Duro v. Reina, 495 U.S. 676, 697 (1991) (holding that tribal law enforcement authorities have the power to detain and eject those within tribal territory who disturb public order).

51. *See Santa Clara Pueblo*, 436 U.S. at 62-63 (1978); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

52. Many tribal governments were reconstituted into tripartite forms pursuant to acts of Congress authorizing tribal governmental reorganization. *See* Wheeler-Howard Act, June 18, 1934, 48 Stat. 984 (Indian Reorganization Act); Thomas-Rogers Act, June 26, 1936, 49 Stat. 1967, (Oklahoma Indian Welfare Act).

53. BRADFORD MORSE, INDIAN TRIBAL COURTS IN THE UNITED STATES: A MODEL FOR CANADA? 11 (1980); 2 NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, JUSTICE AND THE AMERICAN INDIAN: THE INDIAN JUDICIARY AND THE CONCEPT OF SEPARATION OF POWERS 25, 28 (1974). Over the past few decades, though, the traditional religious courts of some Pueblos have evolved into independent constitutional judiciaries. *See, e.g., Statement on Tribal Sovereignty before the Senate Committee on Indian Affairs Oversight Hearing on Tribal Sovereign Immunity* (Apr. 7, 1998) (Statement of R. Bernal, Chairman All Indian Pueblo Council),

Navajo Nation operates a sophisticated judiciary and has an exhaustive tribal code, but no written constitution.[54]

Whether a tribal court possesses jurisdiction over a matter often depends upon the nature of the claim, the identity of the claimant or defendant, and where the claim arose. Jurisdiction might lie exclusively in tribal court, might be shared with a federal court, or might lie exclusively in a federal court.[55] Where concurrent jurisdiction exists, claimants must exhaust tribal remedies before pursuing a claim in the federal system.[56] Tribal courts retain inherent criminal jurisdiction over Indians, but their criminal jurisdiction over non-Indians has been judicially restricted.[57]

In *Talton v. Mayes*,[58] the Supreme Court found that the Bill of Rights only applies to the federal and state governments. Because tribes were not subordinate to these governments and were not signatories to the federal constitution, individuals claiming substantive or procedural violations of their rights by Indian tribes were left without a federal remedy. Talton, a non-Indian, had been convicted of the murder of a Cherokee in a Cherokee Nation court. He challenged his conviction in federal court alleging violation of his Fifth Amendment due process rights, because the Cherokee grand jury was not a grand jury within the contemplation of the Fifth Amendment. The Supreme Court rejected his argument and stated that the powers of self-government "enjoyed by the Cherokee Nation existed prior to the constitution" and were not bound by constitutional protections of individual rights. Several subsequent cases extended *Talton*'s holding to other provisions of the Bill of Rights and the Fourteenth Amendment.[59]

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available at http://indian.senate.gov/1998hrgs/0407_rb.htm.

54. DAVID E. WILKINS, THE NAVAJO POLITICAL EXPERIENCE 101-12 (2003); OFFICE OF NAVAJO GOVERNMENT DEVELOPMENT, NAVAJO NATION GOVERNMENT, 15-32 (4th ed., 1998).

55. *See* Kevin Meisner, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 AM. INDIAN L. REV. 175 (1992).

56. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 (1985).

57. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (divesting Indian tribes of criminal jurisdiction over non-Indian U.S. citizens, because such jurisdiction would be inconsistent with their dependent status). However, at least one tribal Supreme Court has found this decision did not affect its inherent criminal jurisdiction over foreign nationals. "[T]he sovereign power of inherent jurisdiction of the Eastern Band of Cherokee Indians to try and punish non-Indian aliens of the United States has not been expressly terminated by Treaty, Act of Congress, or specifically prohibited by a binding decision of the Supreme Court of the United States or the United States Court of Appeals for the Fourth Circuit." Eastern Band of Cherokee Indians v. Torres (E. Cherokee Apr. 12, 2005) Docket no. CR-03-143 [33] (holding that tribal criminal jurisdiction over non-Indian foreign nationals is not inconsistent with status of tribe as a domestic dependent nation); *see also* Eastern Band of Cherokee Indians v. Chavez CR-03-1039 (E. Cherokee Ct. 2004) (reaching same result with similar facts).

58. 163 U.S. 376 (1896) (holding that the Constitution does not apply to tribes because their authority does not derive from the constitution).

59. *See, e.g.*, Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959) (holding that the First Amendment's protection of religious freedom does not apply to regulations passed by Indian nations); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (holding that the due process clause of the Fourteenth Amendment has "no application to actions of Indian tribes, acting as such").

Individuals, whether members or non-members of an American Indian tribe, who alleged violation of their rights by tribal governments were thus permitted to seek remedies solely in tribal fora.

In 1968, Congress enacted the Indian Civil Rights Act[60] to mitigate the impact of *Talton* and its progeny by granting individual rights against tribal governments similar to those guaranteed in the Bill of Rights and Fourteenth Amendment.[61] However, the *only* remedial provision that Congress included in the Act was the "privilege of the writ of habeas corpus" given to any person in a federal court to "test the legality of his detention by order of an Indian tribe."[62] The purpose of the Act was to ensure that individuals are protected from arbitrary acts by tribal governments. But the remedies were restricted because the federal government also wanted to foster tribal self-government and preserve cultural identity.[63]

The Indian Civil Rights Act as interpreted by the *Martinez* decision guarantees significant substantive and procedural rights to individuals

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60. The rights protecting provisions of the Act, found in 25 U.S.C. § 1302, as amended, provide that:

> No Indian tribe in exercising powers of self-government shall—(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances; (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized; (3) subject any person for the same offense to be twice put in jeopardy; (4) compel any person in any criminal case to be a witness against himself; (5) take any private property for a public use without just compensation; (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense; (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both; (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; (9) pass any bill of attainder or ex post facto law; or (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (2000).

61. This action was taken pursuant to Congress' plenary power to modify or eliminate the tribes' inherent powers of self-government. *See generally* Santa Clara Pueblo v. Martinez, 436 U.S. 49 at 57 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); United States v. Kagama, 118 U.S. 375, 379-85 (1886) (recognizing congressional power to make laws which extend into Indian country and reduce the tribes' authority).

62. 25 U.S.C. § 1303 (2000); *see also* Santa Clara Pueblo, 436 U.S. at 58, 69-71 (rejecting claim that other provisions of the Act necessarily implied a right to a remedy in federal court).

63. Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Reservation, 507 F.2d 1079, 1082 (8th Cir. 1975).

against tribal governments, but it places the remedial mechanisms for such rights in tribal, rather than federal, courts.[64] As discussed below in greater detail, claimants may not assert individual rights against a tribe in federal court *except* in the case of habeas relief or where the tribal judiciary has ruled without subject matter jurisdiction and tribal remedies have been exhausted.[65] The gaps between the Act and the Bill of Rights, Fourteenth Amendment, and other civil rights legislation (not applicable to tribes) also leave gaps in the implementation of U.S. international human rights obligations. The failure of federal enforceability of most of the Act's rights-protecting provisions means that tribal courts remain the exclusive forum for allegations of violations of many of these rights.[66]

II. TRIBAL VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS BINDING ON THE UNITED STATES

A. International Human Rights Obligations

Myriad human rights instruments bind the United States under international law. Those susceptible to tribal violations include the International Covenant on Civil and Political Rights (ICCPR),[67] the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment,[68] and the International Convention on the Elimination of All Forms of Racial Discrimination.[69] Inter-American jurisprudence demonstrates that the American Declaration of the Rights and Duties of Man (American Declaration)[70] also binds the United States

64. Proposals to give federal court jurisdiction to hear complaints under the Act have been introduced in Congress. For instance, Senate Bill 517, 101st Cong., 1st Sess. (1989), would have permitted individuals to enter federal court upon a showing that the tribal court failed to be independent or failed to provide certain procedures. *See* Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 125 n.71 (1995).

65. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985) (holding that claims challenging a tribal court's jurisdiction cannot be brought in federal district court until tribal remedies have been exhausted); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18-20 (1987) (requiring exhaustion of tribal remedies where subject matter jurisdiction is challenged in a diversity case and noting that the Indian Civil Rights Act protects non-Indian individuals against unfair treatment in tribal courts).

66. This is not to suggest that tribal courts are not effective or capable protectors of individual rights. Every legal system has the potential to violate individual rights. For a careful study of several civil rights cases heard in tribal courts, see Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 341-53 (1998).

67. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 19, 1966) [hereinafter ICCPR].

68. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 1465 U.N.T.S. 85 (1984) [hereinafter CAT].

69. International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195 (Dec. 21, 1965) [hereinafter CERD].

70. American Declaration of the Rights and Duties of Man, OAS Res. XXX, International

under international law.[71] Further, tribal law enforcement officials could potentially breach Article 36 of the Vienna Convention on Consular Relations.[72] The United States is legally obligated to adopt such laws or other measures as may be required to give effect to the substantive rights recognized in these documents.

B. U.S. Implementation of its Human Rights Obligations

1. Self-Execution Doctrine

When the Senate ratifies an international human rights convention, it typically enters reservations, declarations, and understandings, which often attempt to restrict U.S. international obligations to the extent they differ from U.S. municipal law.[73] Municipal law governs whether statutory implementation is necessary for these instruments and whether judicial enforceability is available. If the Senate declares a treaty non-self-

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Conference of American States, 9th Conf., OAS Doc. OEA/ser. L./V./I.4 rev. (1948), *reprinted in* ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS, OAS Doc. OEA/ser. L./V./II.23, doc. 21 rev. 5 (1978) *and in* Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser/L/V/II.82 Doc 6 Rev. 1 (1992) 17 [hereinafter American Declaration].

71. *See, e.g.*, Baby Boy Case (United States), Inter-Am. C.H.R., Resolution 23/81 ¶¶ 13-17 (1981) (holding that international obligations of the United States are governed by the OAS Charter; that through the Charter the American Declaration and other human rights instruments gained binding force; and that the Inter-American Commission on Human Rights as the regional organ entrusted with competence to promote human rights has competence to decide whether the United States has violated its obligations under the American Declaration); Roach and Pinkerton v. United States, Case 9467, Inter-Am. C.H.R., Report No. 3/87 ¶ 46-49 (1987) (holding that *jus cogens* norms, binding on the United States, prohibits execution of children and that the United States was in violation of its obligations under American Declaration as interpreted in light of *jus cogens* norm); Interpretation of the American Declaration within the Framework of the ACHR, Inter-Am. C.H.R., Advisory Opinion OC-10/89, A/10 35-45 (1989) (holding that the American Declaration is for OAS member States a source of international obligations); Haitian Interdiction (United States), Case 10. 675, Inter-Am. C.H.R., Report No. 51/96, at n.35 (1997) (holding that for OAS member states the Declaration is the text that defines the human rights referred to in the Charter; that Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration; and that, therefore, the American Declaration is for the United States a source of international obligations related to the OAS Charter). *See also* Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828 (1975); Douglass, Cassel, *Inter-American Human Rights Law: Soft and Hard Law, in* COMMITMENT AND COMPLIANCE 393-418 (Dinah Shelton ed., 2000).

72. Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (April 24, 1963).

73. Only reservations alter a State's responsibility under an international convention, but there may be a question as to whether a particular submission constitutes a reservation or declaration. Reservations operate to exclude a treaty body from exercising its quasi-judicial authority under a human rights treaty. Reservations are permissible so long as the treaty contains no provision to the contrary and they are not "incompatible with the object and the purpose of the treaty." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 19(c), 1155 U.N.T.S. 331. Other States parties may, of course, file objections to reservations.

executing, as it has done for each of the human rights conventions discussed herein, the treaty provisions create no private cause of action and can only be enforced when implemented through federal legislation.[74] For example, while the ICCPR, CERD, and CAT, bind the United States under international law, several federal courts have found that they are not self-executing and are therefore not subject to judicial enforcement.[75] The United States believes its commitment to comply with these conventions requires no implementing legislation because pre-existing federal, state, and local laws provide sufficient and equivalent protection to individuals. As a legal advisor to the State Department testified before a Senate hearing on whether to ratify the International Convention on the Elimination of All Forms of Racial Discrimination: "As was the case with the earlier [human rights] treaties, existing U.S. law provides extensive protection and remedies.... There is thus no need for the establishment of additional causes of action to enforce the requirements of the convention."[76] While this may be true with regard to federal and state governments, it is not true with regard to tribal governments.

2. Municipal Enforcement of International Obligations Against Tribal Governments

The Bill of Rights and the Fourteenth Amendment, among other constitutional and statutory provisions, provide broad protection for individual rights that are enforceable in federal and state courts. Most international human rights provisions that bind the United States find expression through the implementation of these municipal laws. Judicial decisions and federal civil rights legislation have created remedies for their violation by government officers.[77] Yet these enforcement mechanisms are

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74. David Weissbrodt, et al., *International Human Rights: Law, Policy, and Process* 687-89 (3d ed. 2001); Restatement (Third) of Foreign Relations Law of the United States (1987) § 312 cmt. h.

75. *See* United States v. Postal, 589 F.2d 862, 875-77 (5th Cir. 1972); *see also* Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943) (holding that the Court may look beyond written words of a treaty in determining whether it is self-executing). Factors a court may use in determining whether a treaty is self-executing include the purposes and objectives of the States parties, the existence of domestic procedures and institutions appropriate for direct implementation, availability and feasibility of alternative enforcement mechanisms, and immediate and long-range consequences of self and non-self-execution. *See, e.g.*, People of Saipan v. U.S. Dept. of Interior, 502 F.2d 90, 97 (9th Cir. 1974).

76. *Statement before the Senate Foreign Relations Committee, Conrad Harper, Legal Advisor to the State Department*, 5 DISPATCH MAG. 22 (May 11 1994); Weissbrodt et al., *supra* note 74, at 689.

77. *See, e.g.*, 42 U.S.C. § 1983 (2006) (authorizing damage actions where state officials violate individual rights); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-680; Tucker Act, 28 U.S.C. §§ 1346(a), 1491 (1994) (authorizing damage actions against federal government); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Gomez v. Toledo, 446 U.S. 635, 639 (1980) ("a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees").

inapplicable to tribal governments, creating a gap between municipal law and international human rights obligations of the United States.

Congress's singular attempt to implement human rights protections against the tribes, the Indian Civil Rights Act of 1968,[78] contains provisions analogous to those found in the Bill of Rights and provides the only protection (apart from tribal law) for Indians and non-Indians alike against potential tribal violations of U.S. international human rights obligations. Though it became law before U.S. accession to any human rights conventions, the Act reflects several convention provisions. Still, it does not reflect them all, and this is important.

A juxtaposition of the Indian Civil Rights Act and U.S. international human rights obligations reveals substantive discrepancies. For example, article 14 of the ICCPR requires that indigent criminal defendants be provided legal assistance "in any case where the interests of justice so require."[79] With regard to Article 14(3), the United Nations Human Rights Committee has held that States must provide legal assistance to the poor at all stages of criminal proceedings.[80] Even without the convention, the United States implements this provision through the Constitution's due process clauses, which require the states and federal government to provide counsel to indigent criminal defendants facing confinement.[81] Thus, the United States has declared that its municipal law sufficiently implements the ICCPR:

> [T]he United States understands that [article 14(3)] do[es] not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed.[82]

Contrary to the assumptions in this reservation, the Indian Civil Rights Act fails to achieve implementation against tribal governments because it does not require legal assistance under *any* circumstance. Tribes can

78. 25 U.S.C §§ 1301-41 (2000).

79. ICCPR, *supra* note 67, art. 14(3)(d).

80. U.N. Human Rights Committee, Borisenko v. Hungary, ¶ 7.5, U.N. Doc CCPR/C/76/D/852/1999 (2002) ("it is incumbent upon the State party to ensure that legal representation provided by the State guarantees effective representation . . . legal assistance should be available at all stages of criminal proceedings").

81. *Compare* Argersinger v. Hamelin, 407 U.S. 25, 37 (1972) *with* Tom v. Sutton, 533 F.2d 1101, 1104-06 (9th Cir. 1976) (holding that persons subject to imprisonment by tribal courts are not entitled to attorney).

82. 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992) United States "Reservations, Understandings, Declarations, and Proviso" upon ratification of the ICCPR [hereinafter *Reservations*]. The Human Rights Committee also views failure to provide *competent* counsel to indigent criminal defendants violative of the provision. U.N. Human Rights Committee, *Concluding Observations: United States,* ¶¶ 266-304, U.N. Doc CCPR/C/79/Add.50, 288 [hereinafter *Concluding Observations*].

prosecute and sentence destitute defendants to one year's imprisonment and a $5,000 fine without providing legal assistance of any kind.[83] The tribes may choose to provide legal assistance, but federal law does not require them to do so. This is just one example of numerous substantive gaps between the Indian Civil Rights Act and U.S. international obligations.[84]

Domestic acceptance of duplicative tribal-federal criminal prosecutions may be another gap in implementation. In *United States v. Lara*,[85] the Supreme Court considered the application of double jeopardy to dual tribal-federal prosecutions. The case involved a non-member Indian who assaulted a federal officer during an arrest for violation of a tribal exclusion order.[86] The defendant pled guilty to the tribal crime of "violence against a policeman" and served ninety days in prison. The federal government subsequently prosecuted him for assaulting a federal official. Because key elements of the tribal and federal crimes were identical, the second prosecution would normally be abandoned to avoid double jeopardy. However, the Court found the offenses to be distinct crimes against separate sovereigns and upheld the federal conviction.[87]

Article 14(7) of the ICCPR provides that "[n]o one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted."[88] Meanwhile, municipal law treats parallel prosecutions by the state, tribal, and federal governments as offenses against separate sovereigns not barred by the U.S. Constitution's Double Jeopardy Clause.[89] The U.S. reservation to Article 14(7) restricts its application to existing municipal law as to the federal government and its "constituent units."[90] Since the tribes are not constituent units of the federal system, dual tribal-federal prosecutions for the same offense breach criminal defendants' Article 14(7) rights.

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83. Indian Civil Rights Act § 1302(7) (2000). Should a tribe exceed these penalties, the defendant may challenge his or her detention under the habeas review provision after exhausting tribal remedies. 25 U.S.C. § 1303 (2000). Though this mechanism bounds tribal justice systems with federal review in certain instances, the gap in implementation of U.S. human rights obligations remains.

84. Other gaps include the absence of a right to vote, a right to participate in government, a right to review by a higher tribunal, and a right to privacy. *See* 25 U.S.C. § 1302 (2000). Such gaps result in violations of specific U.S. international obligations because of the U.S. failure to include the tribes within its reservations or to implement these obligations against tribal governments.

85. 541 U.S. 193 (2004).

86. *Id.*

87. *Id.*

88. ICCPR, *supra* note 67, art. 14(7).

89. Heath v. Alabama, 474 U.S. 82, 93 (1985) (holding that states are separate sovereigns for purposes of the double jeopardy clause); United States v. Lara, 541 U.S. 193, 197 (2004); United States v. Lanza, 260 U.S. 377, 382 (1922) (noting that offense against separate sovereigns does not trigger double jeopardy protection).

90. *Reservations*, *supra* note 82. On tribes not being constituent units, see for example Toledo v. Pueblo de Jemez, 119 F. Supp. 429, 432 (D.N.M. 1954).

Even where an Indian Civil Rights Act provision reproduces *verbatim* a constitutional right, tribal interests can justify conflicting treatment under the statute and its federal constitutional predecessors.[91] Courts have "correctly sensed that Congress [in passing the Act] did not intend . . . [constitutional principles to] disrupt settled tribal customs and traditions."[92] Essentially, although the Indian Civil Rights Act protections may mirror certain constitutional rights, the substantive meaning of these guarantees under tribal governments will diverge from their meaning under state and federal governments. Moreover, because many international human rights obligations find enforcement through U.S. constitutional rights, the Indian Civil Rights Act provisions may develop meanings unreflective of U.S. international human rights obligations even where the Act's provisions superficially correspond to U.S. constitutional rights.[93]

3. Analysis of a Self-Executing Treaty with Individual Rights Protections

Municipal practice might fail sufficiently to reflect U.S. international obligations even where a treaty is self-executing. For instance, the United States consistently fails to enforce its consular relations obligations against U.S. states and consequently has been haled before the International Court of Justice (ICJ) several times for state violations of Article 36 of the Vienna Convention on Consular Relations, which requires that an arrested foreign national be notified of his or her right to communicate with his or her consulate and that the consulate be notified upon detainment of a national.[94] While federalism concerns and the doctrine of procedural default have prevented domestic enforcement of the Vienna Convention on Consular Relations against U.S. states, potential tribal violations remain

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91. Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082-83 (8th Cir. 1975) (holding that rights found in the Indian Civil Rights Act are not coextensive with similar rights in the United States constitution). *But see* Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (holding that where tribal procedures are identical to those found in Anglo societies, federal constitutional standards may be employed).

92. *Id.* (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 670 (1982 ed.)); *see also* Santa Clara Pueblo v. Martinez 436 U.S. 49, 62-72 (1978) (holding that Congress did not intend the ICRA to incorpoarate process principles which disrupt tribal customs).

93. It must be noted that the United States ostensibly has implemented against tribal governments the preemptory norm of international law prohibiting slavery. The Thirteenth Amendment of the United States Constitution, which bans slavery, applies not only to governmental units of federated entities, but to private actors as well. *See, e.g., In re* Sah Quah, 31 F. 327 (D. Alaska 1886) (ordering release of an Indian held in slavery according to tribal custom).

94. *See, e.g.*, LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31). In both cases the ICJ found the United States responsible for violations of the Vienna Convention where states had failed to follow its requirements.

unexamined.

Federal Indian law scholars and courts assert that the U.S. Supreme Court eliminated tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe.*[95] This holding appears to prevent tribes from breaching Article 36 of the Vienna Convention on Consular Relations.[96] Yet there are four areas in which tribes exercise authority, or have some potential to exercise authority, to assert law enforcement jurisdiction over foreign nationals. First, the membership of some border tribes can include Mexican or Canadian nationals.[97] U.S. municipal law identifies members of recognized tribes as Indians and thus potentially subjects these foreign nationals to tribal criminal jurisdiction.[98] Secondly, though the Court in *Oliphant* spoke of "non-Indians," its reasoning applies only to non-Indians who are also U.S. citizens. The Eastern Cherokee Supreme Court in *Eastern Cherokee Band of Indians v. Torres* exposed this flaw and found that it retains inherent criminal jurisdiction over non-Indian aliens.[99] Thirdly, tribal power to exclude individuals from tribal lands includes a power to detain and remove.[100] Finally, tribal courts potentially retain criminal contempt power over non-Indians.[101] Considering these potential tribal breaches of

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95. 435 U.S. 191 (1978). For an example of a scholarly work proceeding from an assumption that tribes no longer possess criminal jurisdiction over non-Indians, see William Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349 (1992).

96. Joseph Kalt & Joseph Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 17 n.35 (Joint Occasional Papers on Native Affairs No. 2004-05) ("Tribes have no criminal jurisdiction over non-Indians whatsoever.").

97. For example, approximately 8,400 Tohono O'odham members are Mexican nationals. Carmen Duarte, *Tohono O'odham: Campaign for Citizenship, Nation Divided*, ARIZONA DAILY STAR, May 31, 2001, at A1; *see also* Megan S. Austin, *A Culture Divided by the United States-Mexican Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZONA J. INT'L & COMP. L. 97 (1991).

98. *See, e.g.*, LaPier v. McCormick, 986 F.2d 303, 304-05 (9th Cir. 1993) (holding that the definition of an Indian for criminal jurisdiction purposes requires enrollment or affiliation with a federally recognized tribe).

99. Eastern Band of Cherokee Indians v. Torres (E. Cherokee Apr. 12, 2005) Docket No. CR-03-143, ¶¶ 23-25, 28-32 ("In *Oliphant*, all the authority relied upon (treaties, opinions and statutes) sought to protect the liberty of United States citizens from Indians. The Court was not concerned with the protection of aliens in dealing with Indians. Nor has the United States Supreme Court specifically expressed the protection of aliens as a reason to limit the sovereignty of Indian tribes").

100. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 697 (1990) ("Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities."). Tribes may also retain the power to arrest non-Indians for purposes of extradition to the proper jurisdiction or to remove them from tribal lands pursuant to the exclusion power. *See, e.g.*, Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975) ("The power of the Papago to exclude non-Indian state and federal law violators from the reservation would be meaningless were the tribal police not empowered to investigate such violations. Obviously, tribal police must have such power.").

101. *Oliphant* did not address the criminal contempt power of tribal courts, and the tribes seem to have at least contemplated the exercise of this power. *See, e.g.*, Cherokee Code

U.S. consular obligations, congressional plenary power over the tribes frees the United States from the federalism concerns evident in *LaGrand*,[102] and permits Congress to implement the Vienna Convention on Consular Relations against them.

C. The Potential for Tribal Violations of U.S. International Human Rights Obligations

1. Parallel Case Study

Santa Clara Pueblo v. Martinez[103] provides a pellucid illustration of tribal governments' capacity to breach international human rights obligations of the United States. Despite arising prior to U.S. accession to the international human rights covenants, the facts of the case could certainly reappear in a similar case today. Indeed, the tribal law which gave rise to the litigation is still in force.[104] As discussed below, an analogous decision by the U.N. Human Rights Committee, *Lovelace v. Canada*,[105] can be used to test the assertion that the law at issue in *Martinez*, or similar tribal laws, breach provisions of the ICCPR.

2. *Santa Clara Pueblo v. Martinez*

Julia Martinez, a full-blood member of the Santa Clara Pueblo, married a full-blood member of the Navajo Nation in 1941. The couple had children and raised them within Pueblo jurisdiction as tribal members. The children were included in the cultural and spiritual life of the tribe and spoke the Santa Claran language, Tewa.[106] Despite their clear genetic and cultural affinity with the Pueblo, the Pueblo government denied the children tribal membership on the basis of a tribal law which forbade children of Santa Claran mothers and non-Santa Claran fathers to gain membership. The law conversely permitted children of Santa Claran fathers and non-Santa Claran mothers to become tribal members.[107]

(Eastern Band of Cherokee Indians) §§ 1-20 to 1-25 (2001) (making no distinction between Indians and non-Indians for application of criminal contempt proceedings); White Mountain Apache Judicial Code §§ 1-1(K), 2-20(D) (1998) (contemplating exercise of criminal contempt power over non-Indians with punishments including imprisonment).

102. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27) (holding it to be outside federal competence to interfere in state criminal procedure law).

103. 436 U.S. 49 (1978).

104. Bethany R. Berger, *Indian Policy and the Imagined Indian Woman* 14 KAN. J.L. & PUB. POL'Y 103, 114 (2004) (noting that the movement within the Pueblo to change the membership ordinance has not yet succeeded).

105. Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166, at ¶1 (1981).

106. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 n.5 (1978).

107. *Id.* at 52 n.2. The law, enacted by the Santa Clara Pueblo Council, establishes these

Because their father was a non-member, the Martinez children could not acquire citizenship in the political community with which they identified most closely. In the ensuing litigation, the Pueblo did not contest the law's discriminatory nature, but rather asserted that it represented the tribe's patriarchal cultural heritage.[108] Martinez sued the Pueblo and Pueblo Governor in federal court to overturn the discriminatory statute as a violation of the Indian Civil Rights Act equal protection clause.[109] In a seminal decision, the U.S. Supreme Court found that the Act did not abrogate tribal sovereign immunity and created no federal cause of action (other than a habeas corpus remedy, inapplicable to the case). Although the Court explained that the tribal court is the appropriate forum in which to assert violations of the Act, a tribal court will not necessarily entertain a suit against the tribe, or a tribal official, unless tribal sovereign immunity has been waived, whether by tribal common law or by tribal statute. The Indian Civil Rights Act thus becomes an illusory implementation of U.S. international human rights obligations.[110]

A similar federal or state law would have been struck down as a violation of equal protection,[111] but since the tribes are not constituent entities of the union, tribal laws cannot violate such constitutional protections.[112] Yet aside from breaching established constitutional standards, the discriminatory Pueblo membership law violates several international human rights provisions that bind the United States. It therefore breaches U.S. international obligations and, if attributable to the United States, should result in U.S. international responsibility.[113]

The Pueblo statute at issue in *Martinez* violates international human rights obligations of non-discrimination, equal protection, and effective

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membership rules:

> 1. All children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo. 2. . . . [C]hildren born of marriages between male members of the Santa Clara Pueblo and non-members shall be members of the Santa Clara Pueblo. 3. Children born of marriages between female members of the Santa Clara Pueblo and non-members shall not be members of the Santa Clara Pueblo. 4. Persons shall not be naturalized as members of the Santa Clara Pueblo under any circumstances.

108. Brief for National Tribal Chairmen's Association as Amicus Curiae, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (No. 76-682) (quoting the Pueblo Governor as saying that the law represented the only way for the Pueblo to protect and preserve its heritage), *cited in* Berger, *supra* note 104.

109. *Santa Clara Pueblo*, 436 U.S. at 54-55.

110. *See* Dubray v. Rosebud Housing Authority, 12 Indian L. Rep. 6015 (Rosebud Sioux Tribal Ct 1985) (ruling that defendant tribal agency had not waived sovereign immunity after federal court had dismissed plaintiffs claim on basis that tribal court was appropriate forum).

111. Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a state law which discriminated between parental rights based on gender of the parent).

112. While Congress applied certain rights protecting provisions to the tribes in the Indian Civil Rights Act, suits against the tribe under the Act are barred. *See* Santa Clara Pueblo, 436 U.S. at 72.

113. *See Articles*, *supra* note 7, at 80-109.

remedy under the ICCPR and the American Declaration. The tribal gender discrimination at issue in *Martinez* also gives rise to additional violations of individual rights guaranteed by the ICCPR, most prominently the denial to Martinez's children of the individual right to partake in minority culture (Article 27)[114] and perhaps the right to take part in government (Article 25). The Martinez children lost all benefits of tribal membership and faced several other hardships. Under the Pueblo law, when their mother died, they were ineligible to inherit her property, to use Pueblo property, or to remain on Pueblo lands. As non-members they were ineligible to participate in tribal government and could be excluded from access to their culture, language, and religion.

3. *Lovelace v. Canada*

The petitioner in *Lovelace v. Canada*[115] challenged a law very similar to the Pueblo law at issue in *Martinez*. Lovelace, a Maliseet Indian in Canada, lost her tribal membership upon her 1970 marriage to a non-Indian. The Indian Act, a Canadian federal law, terminated the tribal membership of Indian women who marry non-Indians but permitted male Indians who intermarry to retain membership.[116] It also made Lovelace's children ineligible for membership. In *Lovelace*, the U.N. Human Rights Committee recognized that the Indian Act "entails serious disadvantages on the part of the Indian woman who wants to marry a non-Indian man. . . ."[117] These disadvantages were similar to those found in *Martinez* and included loss of the right to reside or possess lands within the reserve, to inherit possessory interests in reserve land, or to be buried on tribal land. Loss of Indian status also resulted in a divestment of the powers to exercise Indian hunting and fishing rights and to partake in tribal culture and religion.[118] The Human Rights Committee did not find Canada responsible for a breach of the ICCPR non-discrimination provisions, but *only* because the Convention did not enter into force against Canada until six years after the marriage.[119] Nevertheless, the Committee found Lovelace's continuing loss of cultural benefits breached Canada's Article 27 obligations under the ICCPR to guarantee the right of minorities to participate in culture,

114. Article 27 of the Covenant states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." ICCPR, *supra* note 67. The tribes' status in municipal law and powers to define membership and to exclude, uniquely positions them to violate this United States international obligation to protect individual access to minority culture, religion, and linguistic community.

115. Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166 (1981).

116. *Id.* ¶ 1.

117. *Id.* ¶ 7.2.

118. *Id.* ¶¶ 9.8-17.

119. *Id.* at ¶¶ 10-12.

language, and religion in community with other group members. Canada has since revised the Indian Act to eliminate gender discrimination and to permit children of women who intermarry to retain tribal membership, but the Human Rights Committee has expressed concern over continuing exclusion of subsequent generations.[120]

4. Comparison of the *Lovelace* and *Martinez* Holdings

Whereas Canada's discriminatory Indian Act at issue in *Lovelace* was a federal law, the analogous law at issue in *Martinez* was a tribal ordinance. Each law deprived minority individuals of their right to partake in culture and religion as protected by international obligations undertaken by the respective host States (Canada and the United States). The laws also had significant effects on property rights and rights of participation in the tribal political community. *Lovelace* substantiates the contention that the Pueblo ordinance violates ICCPR provisions which bind the United States under international law. As the Human Rights Committee articulated in *Lovelace*, the Article 27 right of access to minority culture protects those "brought up on a reserve, who have kept ties with their community and wish to maintain these ties. . . ."[121] This sphere of protection would surely encompass the Martinez children. These cases demonstrate that the American Indian tribes, even through an exercise of their governmental powers valid under U.S. law, may engage in conduct that violates U.S. international human rights obligations.

5. Other Examples of Tribal Governmental Capacity to Breach U.S. International Obligations

In addition, the traditional tribal punishment of banishment may breach international human rights norms, such as the formulation of individual rights of access to minority culture in Article 27 of the ICCPR or the right to participate in one's government under the CERD.[122] Banishment involves expulsion of a member and deprivation of his or her rights to vote, to participate in tribal government, to take part in the tribe's religious and cultural life, to inherit property, to receive tribal payments and social assistance, and to use tribal lands. Banished members have alleged that their tribe imposed the punishment for improper reasons, such as their race or political views.[123] In *Poodry v. Tonawanda Band of Seneca*

120. Human Rights Committee, Apr. 7, 1999, Concluding Observations: Canada, 19, U.N. Doc. CCPR/C/79/Add.105.

121. Lovelace v. Canada, Communication No. R 6/24, U.N. Human Rights Comm'n, Supp. No. 40, 166, at ¶14 (1981).

122. CERD, *supra* note 69, art. 5.

123. *See, e.g.*, Seminole Nation of Oklahoma v. Norton, 223 F.Supp. 2d 122 (D.D.C. 2002) (involving Seminole Nation's exclusion of Seminoles of African-American descent from

Indians,[124] for instance, claimants alleged that the tribe convicted them in absentia of treason, on the basis of "actions to overthrow . . . the traditional government of the Tonawanda Band of Seneca Nation," and banished them. Although the *Poodry* court indicated in dicta that the Indian Civil Rights Act implicitly proscribes banishment, no other cases support this view.[125] The Human Rights Committee has defined minority membership as "objective," and it has been suggested that Article 27 not only prevents States from defining minority group membership, but also prevents minority groups themselves from conclusively defining their own membership where such definition denies access to collective attributes protected by the article.[126]

Federal and tribal case reports reveal several examples of tribal conduct that arguably breaches U.S. international obligations, even within the limited body of federal jurisprudence under the Indian Civil Rights Act. Tribes have prevented members of African descent from voting or participating in government based on their race,[127] in apparent violation of the CERD.[128] Traditional Pueblos have reportedly attempted to limit members' religious freedom.[129] Claimants have alleged free speech violations, arbitrary detention and seizure of property, and conduct arguably within the definition of cruel or degrading treatment.[130]

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voting in tribal election).

124. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 889 (2d Cir. 1996).

125. *Id.* at 895-98.

126. Kitok v. Sweden, *supra* note 5 (stating that a Sami decision to deny membership, for purposes of a national law governing herding rights, to an individual already permitted to herd, did not constitute a breach of Article 27 of the ICCPR); Human Rights Committee, Aug. 4, 1994, General Comment 23: The Rights of Minorities, ¶ 5.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5; SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 755-56 (2d ed. 2004).

127. The Convention proscribes racial discrimination in the context of civil and political rights. CERD, *supra* note 69, art. 5.

128. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1463 (10th Cir. 1989) (involving plaintiffs who were denied their right to participate in tribal elections or tribal government, and their right to tribal services, based on race); Seminole Nation of Oklahoma v. Norton, 223 F.Supp. 2d 122 (D.D.C. 2002); Davis v. United States, 343 F.3d 1282 (10th Cir. 2003) (involving plaintiffs who were systematically denied their right to participate in tribal government and right to tribal services, based on race); CERD, *supra* note 69, art. 5 (providing a right to participate in political community regardless of race). To the extent these cases involve denial of access to tribal cultural events or religious observances, they may also violate the economic and social provisions of the Convention, such as the right to partake in cultural activities.

129. F. Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, 27 POL. STUD. 3 (1979) (traditional religious governments allegedly sought to quell tribal member's growing interest in Christianity). It should be remembered that the Indian Civil Rights Act contains no free expression or antiestablishment clause. Thus, even if a tribe has waived its sovereign immunity defence for alleged Indian Civil Rights Act violations, no standing exists for religious freedom based cases.

130. Choctaws for Democracy v. Choctaw Council, 5 Okla. Trib. 165 (Choctaw Tribal Ct. 1996) (regulation on the distribution of certain literature); Rorex v. Cherokee Nation, 6 Okla. Trib. 239, 241 (Cherokee J.A.T. 1995) (addressing wrongful expropriation of private property); Kennedy v. Hughes, 60 Fed. Appx. 734 (10th Cir. 2003) (unreported) (addressing seizure of property); Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. 2002) (addressing

Conditions in tribal prisons are routinely cited as among the worst in the United States.[131] The Human Rights Committee has commented on conditions in U.S. prisons but has not specifically considered tribal detention facilities.[132] These cases illustrate the lacuna between U.S. international human rights obligations and municipal implementation against tribal governments.

III. DOMESTIC REMEDIES FOR TRIBAL VIOLATIONS

A. Access to Courts

Whereas the few substantive gaps in implementation of international obligations against the tribes may seem trivial, *Martinez* gave rise to a deeper flaw in implementation. As previously mentioned, the Court found that the Indian Civil Rights Act - the only federal legislation that obligates tribes to protect individual human rights and derivatively provides human rights protections -- permits no federal judicial review of tribal violations other than habeas corpus review for ongoing wrongful detention.[133] Thus, an allegation of a tribal human rights violation must be resolved in tribal court, although the Indian Civil Rights Act does not even require the creation of a formal court structure, and tribal courts may find Indian Civil Rights Act claims barred by the tribal sovereign immunity doctrine.[134] Under federal law, tribal courts are technically bound to enforce the Indian Civil Rights Act's provisions. However, federal courts cannot review tribal court decisions, so no guarantee exists that the tribe will enforce the Indian Civil Rights Act or, by extension, U.S. international human rights obligations. This is the procedural gap in implementation: individuals have no domestic forum capable of enforcing certain human rights provisions guaranteed in the U.N. Conventions and American Declaration against the tribes.

The *Martinez* Court also held that the Indian Civil Rights Act creates no private cause of action in federal courts for equitable (declaratory or injunctive) relief against tribal officials and refused to imply congressional intent to create such an action. It reasoned that to do so would undermine the authority of tribal courts and would be contrary to the congressional intention to protect tribal self-government. This decision stands in sharp

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arbitrary detention and degrading treatment).

131. *See, e.g.*, 2003 U.S. DEP'T JUSTICE JAILS IN INDIAN COUNTRY (2005); 2002 U.S. DEP'T JUSTICE JAILS IN INDIAN COUNTRY (2003).

132. *Concluding Observations*, *supra* note 82, at 285 (expressing concern "about conditions of detention of persons deprived of liberty in federal or state prisons"). HRC General Comment 21 clarifies that States bear responsibility for all prisons within their territory. Human Rights Committee, General Comment 21 (Forty-fourth Session, 1992), U.N. Doc. HRI/GEN/1/Rev. 7, at 153.

133. Indian Civil Rights Act, 25 U.S.C. § 1303 (2000).

134. *Commission Report*, *supra* note 41, at 63-67.

contrast to the Court's jurisprudence interpreting civil rights legislation against the states and federal government.[135] In these contexts it regularly infers federal causes of action to promote enforcement of civil rights laws. Yet in the tribal context, the tribes' status as separate political communities and the national policy of tribal independence prevents implied causes of action. The Court explained its reluctance to imply federal judicial review, "[W]e have . . . recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and [s]tate governments."[136]

The *Martinez* judgment also shows that courts treat tribal laws inconsistent with international human rights obligations differently from similarly inconsistent state laws. Where potential conflict arises between a state or local law and a treaty, U.S. courts may interpret the law as consistent with U.S. international obligations.[137] This mechanism prevents invocation of the Constitution's Supremacy Clause to declare state law or local law invalid. Even non-self-executing treaties, such as the human rights conventions, may supersede state law or policy.[138] This mechanism fails in the tribal context because federal courts often lack jurisdiction to review tribal laws that may conflict with U.S. international human rights obligations.

Linneen v. Gila River Indian Community, a case from the Ninth Circuit Court of Appeals, exemplifies the lack of federal court jurisdiction to adjudicate claims by those alleging tribal human rights violations. The non-Indian claimants alleged violations amounting to arbitrary detention and degrading treatment.[139] Although the non-Indian claimants in *Linneen* happen to have been U.S. nationals, foreign nationals could find themselves similarly mistreated by tribal law enforcement officials exercising, for example, the tribal right of exclusion or investigation, which could create an international dispute for reparations for injuries to aliens. Claimants asserted, *inter alia*, false imprisonment and unreasonable search and seizure claims against the tribe and a tribal law enforcement officer.

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135. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978).

136. *Id.* at 71.

137. *See* Geofroy v. Riggs, 133 U.S. 258 (1890); Asakura v. Seattle, 265 U.S. 332 (1924) (striking down ordinance inconsistent with U.S.-Japan treaty). United States courts tend to interpret acts of Congress as consistent with earlier treaties whether the treaties are self-executing or non-self-executing, because the treaties are binding under international law and upholding an inconsistent statute could place the United States in breach of its international obligations. State or local laws may be preempted by self-executing treaties or interpreted so as not to conflict with international treaties which create binding obligations upon the United States. A non-self-executing treaty would not supersede inconsistent state or local law, but if the courts cannot interpret the state or local law as consistent with U.S. international obligations it would be struck down as a violation of the federal government's delegated authority over foreign affairs.

138. For discussion of state and local law in the context of non-self-executing treaties, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115 cmt. e (1987).

139. Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. 2002).

They sought compensation under the Civil Rights Act of 1871, which provides compensation for violations of constitutional rights caused by those acting under color of law. Yet the *Linneen* court dismissed the claims, holding that the Indian Civil Rights Act creates no federal cause of action and neither the U.S. Constitution nor the Civil Rights Act applies to tribes. Tribal sovereign immunity shielded the officer himself from claims for damages and prevented the claimants bringing an action against the tribe or tribal officer in tribal court. Clearly, the tribe's failure to waive immunity denied the claimants an effective remedy.

The expansive protection afforded tribal officials through the tribal sovereign immunity doctrine raises questions of the efficacy of the rule of law in tribal legal systems.[140] The lacuna of coverage of international human rights law in this instance goes unaddressed in legal commentary. Professor Shelton, for example, asserts that the U.S. Supreme Court "has affirmed that the right of access to the courts 'assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights,' such as those recognized in the Civil Rights Act of 1871."[141] This conclusion is incorrect in situations of tribal human rights violations. The Indian Civil Rights Act itself purports to protect individual human rights against violations by tribal governments but creates limited access to federal courts and questionable access to tribal courts.[142] Tribal sovereign immunity can prevent such access and consequently violate the U.S. international obligation to ensure the availability of effective remedies.[143]

B. Substantive Remedies

Even without full implementation of human rights treaties, other common law and statutory mechanisms exist to ensure that individuals alleging human rights violations against federal and state governments have access to tribunals with power to fashion remedies. However, these same mechanisms generally do not provide remedies for tribal violations of individual human rights.

The Human Rights Committee, the Inter-American Commission on Human Rights, and various international claims tribunals have found compensation to be an appropriate remedy for arbitrary deprivations of liberty such as that alleged in *Linneen*.[144] For instance, the U.N. Human Rights Committee has found that where a State violates Article 9 or 14 of the ICCPR it must compensate the victim and "undertake to investigate the

140. *Commission Report*, *supra* note 41, at 65.

141. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 66 (2000).

142. As discussed above, the only access to federal courts is the habeas corpus remedy provided in 25 U.S.C. § 1303 for wrongful detention. Tribal remedies must first be exhausted.

143. *E.g.* ICCPR, *supra* note 67, art. 3(b).

144. SHELTON, *supra* note 141, at 118-20.

facts, take appropriate actions, and bring to justice those found responsible for the violations."[145] A United States reservation to the ICCPR establishes that the United States "understands the right to compensation . . . to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity."[146]

Even the U.S. Supreme Court has recognized that compensation "[from] the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[147] The Court established the common law mechanism for provision of compensation where federal officials violate individual rights in *Bivens v. Six Unknown Federal Agents*.[148] *Bivens* actions do not extend to state or tribal officers, but Congress statutorily enabled claims for compensation against state officials.[149] Professor Shelton views this legislation as an extension of the compensation remedy to "other levels of government."[150] The legislation, however, does not extend to tribal officials. U.S. municipal law permits no claims for compensation against tribal law enforcement officers acting in an official capacity unless the tribe itself has waived tribal sovereign immunity.[151] Appropriate compensation awarded by domestic tribunals can discharge a State's responsibility for violations of its international obligations, such as its duty not to engage in arbitrary detention and inhuman treatment.[152] However, for violations by officials of tribes that have not waived immunity from suit in individual rights, federal courts claim no authority to provide compensation, and the State's responsibility for violation of its international obligations cannot be discharged.

Unlike compensatory relief, equitable remedies are generally available against government officials in the United States to rectify ongoing or imminent governmental violations of individual rights.[153] Under U.S. law, tribal sovereign immunity does not protect tribal officials from suit for equitable relief, but the U.S. Supreme Court refused to find an implied federal cause of action for equitable relief against the tribe or tribal officers in the Indian Civil Rights Act:[154]

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145. *Id.* at 15-16. For an example of a Human Rights Committee statement on the requirement of compensation for arbitrary detention, see Human Rights Committee, Concluding Observations: Uganda U.N. Doc. CCPR/C/80/UGA/2003 1 (2004) par. 17.

146. *Reservations, supra* note 82, understanding 2.

147. Gomez v. Toledo, 446 U.S. 635, 639 (1980).

148. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

149. Civil Rights Act of 1871, 42 U.S.C.S. § 1983 (2000).

150. SHELTON, *supra* note 141, at 67.

151. *Commission Report, supra* note 41, at 63.

152. SHELTON, *supra* note 141, at 107

153. *Ex parte* Young, 209 U.S. 123 (1908).

154. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71-72 (1978); David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L.R. 1103 (2000).

> [U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [the Indian Civil Rights Act] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.[155]

Further, complications arise under tribal law where the tribe has not waived its immunity from suit in civil rights actions, and tribal courts may thus refuse to adjudicate claims for equitable relief.[156] The U.S. Commission on Civil Rights has expressed concern that:

> The barring of all suits against a tribal government without its consent, particularly suits for injunctive or equitable relief under a statute such as the [Indian Civil Rights Act] providing rights against the tribal government, can leave the plaintiff with a feeling of frustration, and often leaves the victim without an impartial tribal forum in which to seek redress under the ICRA or the tribe's own civil rights laws.[157]

Not only does this failure to provide effective remedies make the plaintiff feel frustrated, it also results in a violation of the U.S. international obligation to provide an effective remedy to those whose human rights tribes may have violated.

While federal remedies are generally unavailable, some tribes do enable their courts to fashion effective remedies. In a claim brought by prisoners under the Indian Civil Rights Act's cruel and unusual punishment clause, for instance, the Colville tribal court found official immunity for equitable relief waived and closed the tribal prison until improvements were made.[158] Had tribal prison conditions been severe enough and tribal remedies unavailable, the prisoners may have successfully petitioned a federal court for the writ of habeas corpus, the sole federal remedy available for tribal human rights violations. Congress gave federal courts jurisdiction to issue this "great writ of liberty" in the Indian Civil Rights Act.[159] The Act permits a federal judge to protect individuals against arbitrary or wrongful confinement by an American Indian tribe.

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155. *Martinez*, 436 U.S., at 71-72.

156. Dubray v. Rosebud Housing Authority, 12 Indian L. Rep. 6015 (Roseland Seoux Tribal Ct. 1985); Garman v. Fort Belknap Com. Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984) (holding that the fact that tribal legislative body had not waived tribal sovereign immunity "is an act of tribal self-government that this court cannot ignore").

157. *Commission Report*, *supra* note 41, at 64-65.

158. In re Colville Tribal Jail, 13 Indian L. Rep. 6021 (Colville Ct. Appeal 1986).

159. Indian Civil Rights Act, 25 U.S.C. § 1303 (2000) (providing that any person may test the "legality of his detention by order of an Indian tribe").

A petition for a writ of habeas corpus against tribal detention requires: exhaustion of tribal remedies; a severe restraint of individual liberty; and a violation of the Indian Civil Rights Act's substantive provisions.[160] Exhaustion of tribal remedies typically entails an appeal to the tribe's highest court.[161] A severe restraint of liberty may include tribal action beyond actual physical detention of the claimant: the *Poodry* case permitted habeas review of a tribal decision to banish certain members for treason. Subsequent cases, though, appear to have narrowed the scope of habeas review to situations where a claimant is in physical custody or awaiting criminal trial before a tribal court.[162] Because the federal court must identify a violation of a substantive provision of the Indian Civil Rights Act before issuing a writ of habeas corpus,[163] tribal violations of human rights omitted from the Indian Civil Rights Act, such as the indigent defendant's right to criminal defense counsel, are not cognisable in federal court.[164] The habeas remedy thus confines federal review of tribal human rights violations to tribal court or tribal law enforcement actions enumerated in the Indian Civil Rights Act and resulting in ongoing wrongful detention.

Individuals alleging human rights violations have a right to an effective remedy under international law binding on the United States.[165] This right includes a procedural right of access to a competent tribunal with power to fashion a remedy and a substantive right to an effective remedy.[166] Two problems arise with the domestic remedial regime: tribal sovereign immunity often precludes access to any tribunal, whether federal, state, or tribal, and where a tribal court has power to fashion a remedy, if it declines to do so or its remedy proves ineffective, federal courts lack jurisdiction to review the tribal decision.[167] Municipal law leaves the provision of remedies to the tribes, yet it is the United States which may bear international responsibility where tribes violate individual rights and fail to provide effective remedies.

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160. *See, e.g.*, Dry v. CFR Court of Indian Offenses for the Choctaw Nation, 168 F.3d 1207 (10th Cir. 1999).

161. *See* Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948 (9th Cir. 1998).

162. *See* Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 893-94 (2d Cir. 1996); *see also* Alire v. Jackson, 65 F.Supp. 2d 1124, 1128-29 (D. Ore. 1999) (finding claim of restraint of liberty not "severe" enough for habeas relief); Shenandoah v. Dep. of Interior, 159 F.3d 708, 714 (2d Cir. 1998) ("Habeas relief [under the ICRA] does address more than actual physical custody.").

163. Red Elk v. Silk, 10 Indian L. Rep. 3109, 3110 (D. Mont. 1983).

164. Tom v. Sutton, 533 F.2d 1101, 1106 (9th Cir. 1976).

165. *See* ICCPR, *supra* note 67, art. 2(3); CAT *supra* note 68, art. 14; CERD, *supra* note 69, art. 6.

166. *See* ICCPR, *supra* note 67, art. 2(3); *see also* Joseph et al., *supra* note 126, at 8.

167. *See Commission Report*, *supra* note 41, at 63-67 (citing different tribal waiver policies).

IV. ATTRIBUTION OF TRIBAL VIOLATIONS TO THE UNITED STATES

A. Tribes as State Organs

"Every internationally wrongful act of a State entails the international responsibility of that State."[168] The United States commits an internationally wrongful act, and its international responsibility is engaged, if tribal violations of international human rights obligations are attributable to it. The preceding Parts demonstrate that the tribes may commit acts or omissions that violate the international human rights obligations of the United States. To determine whether a tribal violation incurs U.S. international responsibility requires a further step of examining the principles of attribution under international law.[169] The Iran-U.S. Claims Tribunal has stated that "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State."[170] The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) identify several principles of attribution that could be used to attribute tribal human rights violations to the United States.[171] Article 4 reiterates the rule of customary international law that attributes to States the conduct of government organs *regardless of their position in the State hierarchy or branch of government.* The most plausible method of attribution would be to characterize tribes as State organs, given their municipal status as governmental entities and the unity of the State in international law.[172]

However, that the tribes' legal systems and political institutions exist largely outside the federal framework would make this characterization of tribes as organs of the federal government conceptually difficult from the

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168. *Articles, supra* note 7, at 43.

169. *Id.* commentary to art. 2, at 71 ("In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons . . . which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attiribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State . . . .").

170. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 92, 101-02 (1987).

171. The provisions of the Articles were approved by consensus by the International Law Commission in 2001, with recommendations to the U.N. General Assembly to consider the possibility of convening an international conference of plenipotentiaries to examine the Draft Articles on Responsibility with a view to adopting a convention on state responsibility for internationally wrongful acts. The U.N. General Assembly noted the Commission's work and annexed the Articles to a resolution in 2001. *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 58-60 (2002); G.A. Res. 56/83, U.N. Doc. A/Res/56/58 (Dec. 12, 2001).

172. *Articles, supra* note 7, art. 4.

standpoint of U.S. municipal law. Tribes are not federated entities as their exemption from constitutional human rights norms illustrates. United States public law treats federally recognized tribes as separate political communities with autonomous governments invested with inherent powers and immunities.

Attribution of tribal human rights violations to the United States under international law, however, does not depend upon the domestic characterization of tribal powers; reference to municipal law for the status of State organs is insufficient.[173] The definition of a State organ is construed broadly in international law. Conduct of an entity exercising public functions, such as a tribal law enforcement agency, is normally attributed to the State even if municipal law regards the institution as an autonomous or independent entity.[174] The expansive definition of State organs encompasses sub-State entities analogous to the tribes. For instance, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case attributed conduct of the autonomous region of Sicily to Italy, because the Italian state was responsible for implementation of its international obligations notwithstanding Sicily's status in municipal law.[175] Moreover, the ILC Article 4 notes that all governments affirmed that "the State became responsible as a result of '[a]cts or omissions of bodies exercising public functions of a legislative or executive character'" in preparation for the Conference on the Codification of International Law of 1930.[176] It cites a long line of cases, beginning with *Montijo,* which articulate the principle that it is irrelevant for purposes of characterization of an entity as a State organ whether the entity in question is a federated entity or a specific autonomous area.[177]

For this reason it would be remarkable if an international tribunal considering the question of attribution of a tribal human rights violation to the United States did not find the tribes to be organs of the United States. After all, the U.S. states—which are federated entities unlike tribes—function autonomously in their fields of exclusive competence. They exercise inherent governmental powers, as do the tribes, and the International Court of Justice has attributed responsibility to the United States when its federated entities exercise inherent powers, even if the national government lacks authority to compel state compliance with its international obligations.[178] Similarly, tribal conduct which breaches U.S. international human rights obligations would naturally be attributable to

173. *See id.* commentary to article 4, para. 11, at 90.

174. *See id.* commentary to ch. II, at 82.

175. Heirs of the Duc de Guise (France v. Italy), 13 R.I.A.A. 150, 161 (1951), *cited in* Articles, *supra* note 7, art. 4 commentary, at 88.

176. *Id.*

177. *Id.* para. 9, at 89.

178. LaGrand, 2001 I.C.J. Rep. 466, at ¶ 111 (noting that its previous order "did not create an obligation of result" but that the United States must "take all measures at its disposal" to ensure state compliance.)

the United States, because governmental organs of any type, irrespective of their position within the State, are State organs for purposes of attribution.[179]

An international tribunal should have no difficulty extending the general principle that the State is responsible for the acts of autonomous regions to the tribes as distinct governmental entities within the United States. But could international law directly bind the tribes? Professors Wouters and De Smet[180] suggest the ICJ's statement that "the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States"[181] means that international law obliges federated entities to comply with the federation's international obligations. They stretch the court's language to conclude that "federated entities themselves could under certain conditions be held to be directly internationally responsible for violations of international law."[182] If correct, the tribes would be bound to act in conformity with U.S. international human rights obligations, as a matter of international law.

This obligation is unlikely, however, since neither the tribes nor the states have international legal personality. It is a general principle that the statutory implementation and structuring of international human rights norms, and the specific protection of individuals against violations of these substantive rights, are primarily domestic concerns.[183] The ICJ's failure to revisit the responsibility of U.S. states in *Case Concerning Avena and Other Mexican Nationals*[184] indicates that while the U.S. may bear responsibility for tribal human rights violations, it must also decide how best to prevent tribal (and state) violations.

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179. *Articles, supra* note 7, art. 4, at 43.

180. Jan Wouters & Leen De Smet, The Legal Position of Federal States and Their Federated Entities in International Relations--The Case of Belgium 29 (Leuven Inst. for Int'l Law, Working Paper No. 7 (2001)).

181. LaGrand Case (F.R.G. v. U.S) (Provisional Measures) (Mar. 3, 1999) 1999 I.C.J. Rep. 9, at ¶ 28, stating:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; wheras the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; wheras the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States...

182. Wouters & De Smet, *supra* note 180, at 29.

183. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 61 (1993).

184. (Mexico v. U.S.), 2004 I.C.J. 128 (Judgment of Mar. 31).

B. Tribes as Entities Exercising Governmental Authority

The conduct of entities enabled by municipal law to perform public functions is also attributable to the State.[185] If the tribes were not characterized as State organs for purposes of attribution, tribal human rights violations could still be attributed to the United States under the principle articulated in Article 5 of the Articles on State Responsibility. This principle permits attribution of the conduct of a person or entity which is not a State organ, but which the law of the State empowers to exercise elements of governmental authority, provided the person or entity acts in that capacity in that instance.[186] The commentary indicates that this rule of attribution has been applied mainly to parastatal entities and privatized government service providers. The tribes' authority to exercise a wide range of public functions in U.S. municipal law justifies treating them as parastatal entities that exercise governmental authority in place of federal or state organs.

This category is a narrow one, but likely encompasses attribution of tribal human rights violations to the United States. Unlike the preceding principle on the attribution of the conduct of State organs, it requires analysis of municipal law. The conduct to be attributed must be of a public nature and the entity must exercise its power under municipal law.[187] Although the source of tribal authority does not generally flow from the basic U.S. law, the Constitution, federal common law and legislation have long recognized tribes as entities empowered to assert their own governmental authority. Tribal public functions include the provision of social services, law enforcement, prisons, and courts. Tribes can also privatize their public functions. So, for example, the conduct of a privatized tribal prison official is attributable to the United States because the official exercises governmental authority. This authority is tribal rather than state or federal but is attributable to the United States because of its public nature.

C. Tribes as Private Entities

It appears the tribes, as governmental entities, satisfy the test for State organs under the international law of State responsibility. Judge Canby, however, has proposed that recent U.S. Supreme Court jurisprudence may

185. Articles, *supra* note 7, at 92-95.

186. *Id.*

187. Articles, *supra* note 7, at 94 ("Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.")

articulate a theory of tribal powers as non-governmental.[188] A line of cases implicitly characterizes tribal jurisdiction over non-members as though the jurisdiction derives from a status analogous to private associations or private landowners.[189] Private clubs can regulate membership and landowners can establish rules for others on their land. If accepted, this non-governmental view of tribal powers could impact attribution, because international tribunals may look to municipal law for guidance in determining whether an entity operates as a private association or a State organ.[190]

An instructive contrast is that between tribal conduct and the conduct of cultural or religious communities such as the Amish. The Amish govern themselves through customary laws, live in isolated communities without modern conveniences, speak their own language, and adhere to a strict religious creed. It is possible for the Amish to breach members' substantive rights under international law, such as the right to education,[191] or the right of minorities to partake in the cultural, religious, and linguistic life of the minority community, without judicial sanction.[192] Yet Amish communities are neither state organs nor entities exercising governmental authority because they have no public functions or authority. Their conduct is not generally attributable to the United States unless the United States acknowledges or adopts the conduct as its own.[193]

Unlike the Amish, the federally recognized tribes have separate legal personality under municipal law as governmental organizations and instrumentalities.[194] The United States recognizes the tribes' prescriptive

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188. WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 86-87 (4th ed. 2004). *See also* Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems, in* 16 UNIVERSITY OF CONNECTICUT SCHOOL OF LAW WORKING PAPER SERIES 1, 34-46 (2004).

189. Montana v. United States, 450 U.S. 544 (1981) (holding there to be no regulatory jurisdiction over non-member hunting and fishing activity on non-member-owned land); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding there to be no prescriptive jurisdiction over non-member-owned land within open area of a reservation); Strate v. A-1 Contractors et al., 520 U.S. 438 (1997) (no adjudicative jurisdiction over tort action between non-members arising from an accident on a state highway easement within a tribal territory); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (holding there to be no power to tax non-Indian activities on non-Indian-owned land within tribal territory); Nevada v. Hicks, 533 U.S. 353 (2001) (finding no enforcement jurisdiction over non-Indian officers engaged in investigation for off-reservation crime).

190. Articles, *supra* note 7, at 84-92.

191. American Declaration, *supra* note 70, at art. XII; Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding Amish withdrawal of children from public school to be constitutional).

192. ICCPR, *supra* note 67, art. 27.

193. Articles, *supra* note 7, 104, 188.

194. The unrecognized tribes, like the Amish, cannot be classified as State organs. Municipal law views them as non-governmental entities, and they exercise no prescriptive or enforcement jurisdiction. Whilst these tribes may retain residual governmental powers, they are generally characterized as private entities. Of course, traditional tribal governments may continue to operate, but without U.S. recognition they are no different than private associations in municipal law. Although it is theoretically possible for an unrecognized tribe to violate a member's right to access to minority culture or to deny retained tribal treaty rights

and enforcement jurisdiction over non-members for the purposes of civil adjudication and exclusion. The few decisions indicating a judicial view of the tribes as private associations cannot overcome the substantial precedent and current practice by which the United States treats tribes as governments. Present law requires the federal government to engage with tribes on a government-to-government basis.[195] Further, the U.S. Supreme Court recently held that tribes retain inherent governmental powers over non-member Indian criminal defendants.[196] It appears unlikely that an international tribunal would view tribes as governmental entities when exerting authority over Indians, but not when exerting authority over non-Indians. This municipal recognition provides a basis for international treatment of tribes as State organs.

While purely private conduct cannot generally be attributed to a State,[197] the United States may be held internationally responsible for private conduct in particular circumstances. The human rights instruments require it to ensure the rights protected to all individuals within its territory. It fails to meet this obligation if it allows private violations to occur with impunity or without fear of retribution. To ensure human rights protections, States must exercise due diligence to prevent private conduct which breaches an individual's human rights and to investigate and punish such violations.[198] A State's omission, as a breach of its human rights obligations, must remain analytically distinct from attribution of private conduct, however.[199] If State agents control, direct, or approve human rights violations committed by private actors, or decide to allow such violations to continue, the acts are attributable to the State.[200] The commentary to Chapter II of the Articles on State Responsibility notes that the different rules of attribution have a "cumulative effect" so that a State may be held internationally responsible for the effects of a private entity's conduct. If the United States fails to take necessary measures to prevent such effects, it faces the possibility of international responsibility for human rights violations by the Amish, unrecognized tribes, or other private entities or actors. [201] If it knew, for example, that an unrecognized tribe had arbitrarily detained and mistreated an individual, but permitted the detention to continue, the tribal conduct would then be attributed to

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to individuals, these breaches are not generally attributable to the United States.

195. Proclamation No. 7620, 67 Fed. Reg. 67,773 (Nov. 1, 2002) ("To enhance our efforts to help Indian nations be self-governing, self-supporting, and self-reliant, my Administration will continue to honor tribal sovereignty by working on a government-to-government basis with American Indians . . . .").

196. United States v. Lara, 541 U.S. 193 (2004).

197. Articles, *supra* note 7, at 119-23.

198. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶170 (1988).

199. *Id.* ¶166. (holding State responsible for breach of obligation to ensure rights although private act which caused substantive harm was not attributable to the State).

200. Articles, *supra* note 7, at 103, 118.

201. *Id.* at 84-92.

it.[202]

D. Tribal Agents Exceeding Authority

A tribal agent may incur U.S. international responsibility for conduct that violates an individual's human rights even if the agent acts outside his or her sphere of authority or violates tribal or federal law.[203] In *Linneen*,[204] the non-Indian claimants asserted that a uniformed tribal law enforcement officer arbitrarily detained them for three to four hours, pointed his gun at their heads, threatened to seize their property and kill their animals, and told them immediately to accept Jesus Christ as their savior, because he was going to kill them and dispose their bodies in the wilderness. Such action by a tribal official violates international prohibitions on arbitrary detention and, possibly, provisions on cruel or inhuman treatment. Tribal sovereign immunity shielded the officer and tribe from suit in tribal and federal court because he was acting in his official capacity at the time. Although such arbitrary detention and mistreatment goes beyond the tribal officer's legitimate powers, this does not affect attribution.[205]

The *Caire* claim demonstrates that such *ultra vires* actions by tribal public officials are attributable to the United States. In *Caire*, the tribunal held that the conduct of public officers, even if they act outside their competence, involves the responsibility of the State if the officials act "under cover of their status...and use[] means placed at their disposal on account of that status."[206] Whether a tribal official acts in his or her official capacity depends on whether the officer was "cloaked with governmental authority."[207] Tribal police, wardens, and other tribal officials, operate as public officials within tribal territory. The rules of attribution make conduct of such governmental officials attributable to the State, even if such conduct exceeds the officials' authority under tribal or federal law.[208]

V. POTENTIAL INTERNATIONAL REMEDIAL MECHANISMS

The United States has not accepted the individual petition mechanisms which enable the U.N. human rights monitoring bodies (the Human Rights Committee, the Committee Against Torture, and the Committee on the Elimination of Racial Discrimination) to consider individual complaints, to

202. United States Diplomatic and Consular Staff in Tehran Case (U.S. v. Iran), 1980 I.C.J. 3, ¶¶ 67-70 (judgment of May 24).
203. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶170 (1988).
204. Linneen v. Gila River Indian Community, 276 F.3d 489 (9th Cir. 2002).
205. ICCPR, *supra* note 67, at 175; American Declaration, *supra* note 70, arts. I, XXV.
206. Articles, *supra* note 7, commentary to art.7, at 101 (citing 5 R.I.A.A. 516, 531 (1929)).
207. Petrolane, Inc. v. Islamic Republic of Iran, 27 Iran-U.S. Cl. Trib. Rep. 64, 92 (1991).
208. Articles, *supra* note 7, art. 7, at 44.

reach views on the merits, and to recommend remedies.[209] Thus, an individual deprived of his or her due process rights or tortured by an American Indian tribe could not bring a petition before the Human Rights Committee or the Committee Against Torture. However, it is possible for the monitoring bodies to address alleged tribal violations of U.S. human rights obligations through the State reporting, inquiry, and inter-State complaint procedures (though the inter-State complaint mechanisms have never been used).[210] Until the recent United States withdrawal from the Optional Protocol on compulsory jurisdiction to the Vienna Convention on Consular Relations takes effect,[211] the ICJ would also have jurisdiction over disputes if a tribal government were to violate a foreign national's right to consular notification.[212] Alternatively, if a tribe interferes with the substantive rights of a foreign national, the injured party's state may seek redress through international dispute resolution mechanisms and diplomatic pressure.

The regional inter-American human rights regime allows injured individuals or groups to petition the Inter-American Commission on Human Rights. This mechanism extends to violations of the American Declaration, a source of international obligations binding on all Organization of American States (OAS) member states, and therefore permits petitions against the United States, which is not a state party to the American Convention on Human Rights. The United States has objected to the American Declaration's binding character.[213] Nevertheless, the Inter-American Commission has several times asserted authority to declare the

209. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 302; CAT, *supra* note 68, art. 22; CERD, *supra* note 69, art. 14.

210. ICCPR, *supra* note 67, art. 41; CAT, *supra* note 68, art. 21; CERD, *supra* note 69, art. 11. Only the CAT includes the inquiry mechanism. CAT, *supra* note 68, art. 20.

211. Although the United States withdrawal appears to be effective immediately, the ICJ would likely find a period of notification required. Vienna Convention on the Law of Treaties, *supra* note 73, art. 56. The United States is not a state party but regards its provisions as declaratory of customary international law. *See, e.g.*, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301 (2d Cir. 2000) ("We therefore treat the Vienna Convention as an authoritative guide to the customary international law of treaties."); Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1296 n.40 (11th Cir. 1999), *quoting* Kreimerman v. Casa Veerkamp S.A. de C.V., 22 F.3d 634, 638 n.9 (5th Cir. 1994) ("Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.").

212. *See, e.g.*, LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27), at 514 (holding that the I.C.J. has jurisdiction over Germany's complaints against the United States under the Optional Protocol concerning the Compulsory Settlment of Disputes to the Vienna Convention on Consular Relations when Arizona, a sub-state entity, breached the United States' consular obligations); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31), ¶¶ 153(2)-(6) (rejecting the United States' objection to ICJ jurisdiction and finding the U.S. in breach of its consular relation obligations, although several of the violations were committed by, and under municipal law within the sole power of, state governments).

213. *See* Garza v. Lappin, 253 F.3d 918, 924-25 (7th Cir. 2001); Juan Raul Garza v. United States, Case 12.243, Report No. 52/01, Inter-Am. C.H.R., OEA/ser.L/V/II.111 doc. 20 rev. at 1255 (Apr. 4, 2001).

United States in breach of its international obligations under the Declaration and to make recommendations on remedial measures.[214] The Inter-American Commission has also declared the United States responsible for violations of rules of customary international law and *jus cogens* norms relative to human rights.[215] If the United States fails to comply with recommendations of the Inter-American Commission, the Commission may ratify and publicize its report and submit it to the OAS General Assembly. It continues evaluating measures adopted in respect of its recommendations until compliance is achieved.[216]

Exactly which rights individuals possess under this regional system is a matter of some controversy. The revised OAS Charter refers to "fundamental rights," but does not define the phrase.[217] The Inter-American Commission has interpreted it to mean the American Declaration principles read "in light of" current international law,[218] which extends its reach beyond the Declaration principles themselves.

This interpretive method has implications for the study of potential tribal human rights violations because it allows the Inter-American Commission to declare responsibility for international obligations beyond those espoused in the Declaration. For instance, the Inter-American Commission has interpreted the Declaration in light of Article 27 of the ICCPR on individual rights to partake in minority culture, which the tribes are in a unique legal position to violate through tribal laws defining membership and the quasi-criminal punishment of tribal banishment. The Inter-American Commission has relied on this ICCPR provision to find violations of American Declaration protections including the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).[219] The Inter-American Commission has also based violations of the Declaration's right to a fair trial and due process of law

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214. *See, e.g., Baby Boy Case, supra* note 71; Roach and Pinkerton v. United States, Case 9467, Inter-Am. C.H.R., Report No. 3/87 ¶ 46-49 (1987); Salas v. United States, Case 10.573, Inter-Am. C.H.R., Report No. 31/93 (1999).

215. Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02 ¶¶ 43-50 (2002).

216. RULES OF PROCEDURE OF INTER-AM. COMMISSION ON HUMAN RIGHTS, *in* 2000 INTER-AM. C.H.R. ANN. REP. 1495, 1511, arts. 45, 46 (amended Oct. 25, 2002 and Oct. 24, 2003).

217. 119 U.N.T.S. 3, 2 U.S.T. 2394, Mar. 2, 1948, preamble, arts. 3(l), 12.

218. The Inter-American Court of Human Rights takes into account "the *corpus juris gentium* of international human rights law" when interpreting the American Declaration. Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02/OEA/Ser. L/V/II 717, doc. 1 rev. 1 ¶¶ 96-98 (2001).

219. The Yanomami Case, Case 7615 (Brazil), Inter-Am C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1 ¶¶ 24, 31 (1985); IACHR 'Report on the Situation on the Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (Nicaragua)' OEA/Ser.L/V/II.62, doc 10 rev. 3 (1983). It has also interpreted the American Convention on Human Rights in light of Article 27 of the International Covenant on Civil and Political Rights. Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1, at 03-04 (1997).

provisions (Articles XVIII and XXVI) on U.S. obligations to foreign nationals and their States under the Vienna Convention on Consular Relations.[220]

The Inter-American Commission's individual petition mechanism provides one avenue for those alleging human rights violations by the United States to pursue a claim before an international tribunal. The exhaustion of domestic remedies rule applies to Inter-American Commission petitions, but tribal sovereign immunity may preclude pursuit of any tribal or federal remedy. Tribal courts may or may not have jurisdiction over the claim depending on whether the particular tribe limits immunity from suit in cases alleging violations of human rights. Of course, even if the tribal court fashions a remedy it may prove ineffective and permit a challenge at the inter-American level. Even where tribes waive immunity from suit, the doctrine of tribal sovereign immunity also prevents an appeal to federal court, except in cases of ongoing physical custody. This situation permits an injured individual in most human rights cases to overcome the Inter-American Commission's exhaustion of domestic remedies hurdle by exhausting whatever tribal remedies are made available. Appeals to federal courts should not be required as they generally lack jurisdiction to review human rights claims against the tribes.

In the recent *Dann* case, the Commission found the United States responsible for violations of international law related to its wrongful taking of Western Shoshone tribal lands. In particular, it concluded that the United States failed to ensure the Danns' American Declaration rights to a fair trial, to property, and to equality before the law.[221] The Commission recommended that the United States provide the petitioners with an effective remedy, including adoption of legislative or other measures to ensure respect for their right to property.[222] It further recommended that the United States ensure that property rights of indigenous persons are determined in accordance with the rights established in the American Declaration.[223] The case marked the first instance of an international human rights body finding the United States responsible for violating human rights specific to an indigenous people. Tribes have heralded *Dann* as a model for future complaints against the United States to promote tribal interests. Yet tribes may not realize that the Inter-American Commission's individual petition mechanism also permits the Commission to consider claims against the United States for human rights violations by the tribes themselves.

A case such as *Linneen,* where a tribal official allegedly arbitrarily

220. Villareal v. United States, Case 11.753, Inter-Am. C.H.R., Report No. 52/02 ¶ 5 (2002); Fierro v. United States, Case 11.331, Inter-Am. C.H.R., Report No. 99/03 ¶ 40 (2003).

221. Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02/OEA/Ser. L/V/II 717, doc. 1 rev. 1 ¶ 172 (2001).

222. *Dann*, Case No. 11.140, Inter-Am. C.H.R., at ¶ 173(1).

223. *Dann*, Case No. 11.140, Inter-Am. C.H.R., at ¶ 173(2).

detained and mistreated individuals, provides an ideal candidate. If it, or a similar case, were to come before the Inter-American Commission and a tribe had in fact violated individual human rights provisions binding on the United States, the Commission could attribute such conduct to the United States. The Commission could then declare the United States responsible for both the tribal violation and the lack of an effective remedy in the tribal or federal legal systems. The Commission would likely recommend compensation and provision of an effective remedy, and evaluate implementation of its recommendations.[224] Tribal human rights violations may arise in other contexts as well. The *Linneen* claimants were U.S. nationals, but foreign nationals could similarly find themselves subject to mistreatment by a tribal officer potentially creating an international dispute for mistreatment of aliens.

Although no international monitoring body has yet investigated human rights violations by tribal governments, the U.S. Commission for Civil Rights has recommended that Congress establish extensive Indian Civil Rights Act reporting procedures to monitor the need for future amendments. Under its proposal the tribes must annually report the disposition of all Indian Civil Rights Act claims including the alleged violation, the tribal forum in which the complaint was filed, the potential for appeal, and the types of remedies available.[225] The reports would enable Congress to monitor the success or shortcomings of the Indian judicial systems, but Congress has not yet mandated such a reporting scheme. Additionally, President Clinton established a body whose mandate included a review of tribal human rights violations, but it has not issued any reports or recommendations.[226]

CONCLUSION

U.S. federal and state law largely reflects the United States

224. Whether the United States would ever recognize the authority of the Commission to make such a recommendation, or the legitimacy of such a decision, is, of course, doubtful. The United States communications with the Commission regarding the *Dann* case and its withdrawal from the Optional Protocol on Compulsory Dispute Resolution to the Vienna Treaty on Consular Relations in response to the International Court of Justice ("ICJ") decisions in *LaGrand* and *Avena* demonstrate its unwillingness to recognize or to comply with external decisions regarding its implementation of human rights norms. *See, e.g.*, Response of the Government of the United States, Dann v. United States, Case No. 11.140, Inter-Am. C.H.R., Report No. 53/02 (Oct. 10, 2002); 2002 DEP'T STATE DIG. U.S. PRAC. INT'L L. 367-82 (2003) (extensive U.S. response to the *Dann* final report); Adam Liptak, *US Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, May 10, 2005, at A16. The tribes, on the other hand, may be willing to take measures to prevent future findings of U.S. international responsibility, both to prevent U.S. actions which may limit tribal sovereignty and to gain legitimacy as subjects under international law.

225. *Commission Report*, *supra* note 41, at 72-74.

226. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

international human rights obligations and enables the federal and state judiciaries to fashion appropriate remedies where individual rights are violated. The map of American human rights law, however, contains substantive lacunae in legislative implementation against the American Indian tribes, which have authority to engage in conduct that may constitute a breach of an international human rights obligation of the United States. While the United States represents to the Human Rights Committee that "[t]he Constitution greatly restricts the ability of the government at all levels to infringe on the liberty of its citizens... ,"[227] this is simply untrue with respect to tribal governments, which are not bound by the constitutional protections.

Procedural gaps also exist. Although the federal Indian Civil Rights Act of 1968 superficially reflects certain U.S. international human rights obligations, most remedies for violations of the Act are only available in tribal courts. Further, these tribal courts may deny claimants access on the basis of the tribal sovereign immunity doctrine.

Tribal violations of U.S. international human rights obligations are attributable to the United States because the tribes are governmental entities within municipal law, and as such fall under the rubric of State organs. The United States, therefore, commits an internationally wrongful act whenever tribal conduct breaches an individual's substantive rights protected by international law and binding upon the United States. It can thus be held internationally responsible for tribal acts it does not control and for which its judiciary cannot fashion a remedy.

The disjuncture between U.S. international human rights commitments and its domestic implementation against the tribes must be rectified: the United States is bound by international law to adopt measures to give effect to its international human rights obligations. No domestic legal obstacles exist to federal legislation implementing international human rights obligations against the tribes because Congress retains plenary legislative power over them.[228] If the United States wishes to correct the gaps identified in its legislative implementation, the Indian Civil Rights Act should be revised to reflect fully international human rights instruments binding on the United States. Furthermore, to protect the United States from international responsibility for acts or omissions of tribal governments, Congress may decide that it is in the best interests of the United States to limit tribal sovereign immunity explicitly in cases where individuals allege human rights violations and to give federal courts the power to review tribal court decisions implicating substantive individual rights. If Congress wishes to protect the United States from being found internationally responsible, the federal courts could also be given the power to fashion remedies, including compensation, for tribal

227. *HRC Initial Reports of States Parties Due in 1993: United States of America*, U.N. Doc. CCPR/C/81/Add.4 (1994), para. 203.

228. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

human rights violations.

The tribes, meanwhile, might avoid or at least discourage such federal intrusion upon their independence by incorporating international human rights obligations into the tribal legal system, and carefully complying with those rights. This might require waiving tribal sovereign immunity for suits against tribal officials alleged to have violated human rights, and enabling tribal courts to develop appropriate remedies for such violations, including compensation, along the lines of federal and state waivers. Otherwise, a case like *Linneen* may eventually find its way to an international monitoring body and the United States may be found responsible for the tribal conduct. Such a finding would create intense domestic pressure for restrictions on tribal independence and self-government.

Indications are that some tribes have recognized the dilemma. The proposed Blackfoot Nation Constitution, for example, incorporates international human rights protections.[229] Other tribes, such as the Colville Confederated Tribes, have incorporated international law as a source of law in its tribal code.[230] These developments should be encouraging for those who desire greater tribal independence, but, unless the tribes remain vigilant and provide effective remedies for alleged human rights violations, the potential exists for more intrusive federal restrictions and oversight.

229. BLACKFOOT NATION CONST. (Proposed Constitution), arts. 5(2) & 8, *cited in* Taiawagi Helton, *Nation Building in Indian Country: The Blackfoot Constitutional Review*, 8 KAN. J.L. & PUB. POL'Y 1, 1 (2003).

230. Colville Confederated Tribes v. Seymour, 23 Indian L. Rep. 6008 (Colville Ct. App. 1995).